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Robert Steele

ROBERT WILBUR STEELE

DEFENDER OF LIBERTY

BY
WALTER LAWSON WILDER

"Nature doth nothing so great for great men,
As when she's pleased to make them lords of truth;
Integrity of life is Fame's best friend
Which nobly, beyond death shall crown the end."
—*John Webster.*

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To the Young Men of the West

who have faith in an American ideal of democracy
and who measure Life by the standards of
Integrity, Unselfishness and Patriotism,

IN MEMORY

of one who followed faithfully
along the paths they seek to tread,
this book is dedicated.

April 22, 1952 Gift of the W.A. White Estate

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PREFACE

In presenting this sketch of the life and work of my husband, my own desire has been strengthened by the solicitation of many of his friends.

The book is not intended as a complete biography, but includes a recital of the prominent events connected with his official life.

His character was one of such modesty and simplicity that but an imperfect record can be obtained concerning many of his activities, but enough is known to establish his position permanently as a clear figure of loyalty and truth, the champion and friend of the people.

His purpose in all the years of his public life was to be of real service to the people, for whom he labored untiringly and in whom he had an abiding faith. He ever regarded himself as an instrument to execute their will, and he considered his duty to his state above all else.

It is my hope that his efforts for justice and humanity shall be continued through these pages, and that young men desiring to hold steadfastly to the highest ideals of citizenship, and to live a life of patriotism, purity and honesty, may find inspiration and encouragement from his example.

A. T. S.

ROBERT WILBUR STEELE

DEFENDER OF LIBERTY

CHAPTER I

THE PEACEFUL REVOLUTION

> "We are upon the eve of a great reconstruction. It calls for creative statesmanship as no age has done since that great age in which we set up the government under which we live, the government which was the admiration of the world until it suffered wrongs to grow up under it which have made many of our own compatriots question the freedom of our institutions and preach revolution against them. I do not fear revolution. I do not fear it even if it comes. I have unshaken faith in the power of America to keep its self-possession."
>
> WOODROW WILSON.
>
> (Address before the American Bar Association, August 31, 1910.)

THE first decade of the twentieth century marked in Colorado a revolution in the institutions and the practices of government so profound and so extensive that the people of this community, who have lived through that period of change and of strife, are even yet unaware of the full extent of its meaning and consequences.

The measures of progressive legislation, as they are commonly called, now adopted into the fundamental, constitutional structure of political organization, including the direct primary, the perfected Australian ballot, the initiative, referendum and recall, with the complete system of municipal government collectively known as "the commission plan," involve something more than a modification of the political institutions that existed in this state in the closing years of the nineteenth century. They constitute, in effect and in form, a new instrument of government, recognized as such both by its opponents and its advocates, and admitted universally to be the outcome of a conscious effort of the masses of the people to secure a more direct and a more genuine measure of popular self rule. Yet these changes of form and practice have been accomplished without any reversal of the principles upon which free government has always rested. There has been no change in the ultimate ends for which government is established and maintained by the free and enlightened people of the world.

As a result of the adoption of these amendments to the state constitution, many evils that seemed inseparable from the political system have been dissected and destroyed. New evils, perhaps, or new dangers, have been introduced, but such bold frauds as marked the development of the political machines, such persistent and insolent defiance of the people's will as characterized the opposition to the miners' eight-hour law, such usurpations of unconstitutional powers as were the result of the effort to establish machine government as the fruit of machine politics, cannot be repeated under present conditions. Already it is hard to realize that such evils were; it is increasingly difficult to understand how they came to be possible.

The reaction in Colorado against existing political forms, customs and institutions, and the popular determination to regain control of public affairs from those persons whom the people had come to regard as usurpers, was closely connected with a wider movement affecting nearly every American state. In Colorado, as elsewhere, the development, the incidents, the applications, the course and the final extent and results of this movement were largely modified and determined by local conditions. Each state of the Union has felt, in greater or less degree, the symptoms of popular unrest and dissatisfaction. Each has counted some amount of progress that has been made in a period of change and reconstruction. Each is prone to assume that its experiences have been more wonderful, more illuminating, more beneficial than those of other states. New Hampshire, New Jersey, New York, Pennsylvania, Wisconsin, Missouri, Oregon, Washington are in the minds of all men as examples of political progress in recent years, and there is perhaps no state in which a careful search would not disclose some evidence of a similar movement.

In Colorado the transition from the old to the new has been marked by events of dramatic intensity and of sensational force. The strife of parties and of factions has been carried far beyond the range of ordinary political contests. The state has been brought to the verge of civil war. Political discussion has been extended to the ultimate and basic principles of civic and social organization. If on the one side ancient and outworn dogmas have been summoned to sustain the defense of positions hard pressed by the popular assault, on the other some of the soundest and firmest conclusions of human experience have been called in question, and some of the wildest of ancient follies have been propounded as the newest and best revelations of political wisdom.

A review of any portion of the vast domain of politics and government in Colorado cannot be complete without some consideration of those major movements and influences that have determined all minor events. No consideration of the part played by any individual in the public affairs of this state in recent years can be reasonable or adequate without an analysis and an understanding of the great currents of popular thought and feeling during that period. This is particularly true of one to whom it was allotted to stand in a peculiar and impressive manner as the prophet of the New Era; a man of extraordinary foresight and discernment, of judicial temperament unswayed by all the clamor of faction and the clash of opposing interests, of unimpeached and unimpeachable personal integrity; a statesman whose clear vision struck straight through the sophistries of demagogues on one side and of the hirelings of special interests on the other, down to those fundamental principles of American popular government which, buried for a time under an accumulated mass of perversion, abuse and misunderstanding, were always potential as a living source of regeneration and of cure for political ills; a judge whose only standard of official duty was his own clear-sighted vision of the eternal principles of Law, Justice and Humanity, and with whom the clamors of the mob were as ineffective as were the appeals to selfish ambition and personal interest made by those concerned in subverting public offices to personal ends—ROBERT WILBUR STEELE, late chief justice of the Supreme Court of Colorado.

To no one man can properly be given the sole or even the main credit for the reforms that have come into the politics and the government of Colorado in recent years. Upon no one man ought to be imposed all the blame, either for delay in much needed change or for the furtherance of unwise or untimely measures of radical legislation or constitutional amendment. Yet in the complicated struggle, extending through many years, involving every department of government and engaging the activities of many men—governors, legislators, politicians, writers, speakers, and leaders in every way of public life—if any part of the contest is likely to be overlooked or underestimated it is that waged before the great tribunal that has assumed from time to time not merely to declare the meaning of laws written by the representatives of the people, but also to determine the limits of the power of the people to make effective their will in public affairs. More than once in the course of those revolutionary years the Supreme Court of Colorado was appealed to as the arbiter in disputed questions which concerned something immeasurably more important than the ordinary issues of civil or criminal cases and which, reaching down to the very roots of American free government, involved the most vital and primal principles of personal liberty and political freedom.

It is not surprising that, amid the peculiar conditions of Colorado in those years, the Supreme Court of the state—which is in its nature that branch of the government least amenable to popular influences—should have been regarded by those concerned in resisting the rising tide of progressive legislation as the citadel of conservatism. If it could be established as a paramount principle of government that this high court was possessed of authority to determine not only the limitations of the powers of the executive and legislative departments, but also the constitutional restrictions permanently imposed upon the people in deciding the methods and in choosing the instruments of self government, that group of a few men, elected for long terms of office, and limited by necessary qualifications of learning, mentality and experience to a class removed from the common thoughts and impulses of the people, would easily become by far the most powerful part of the government. And such a court, so constituted and with such powers, steadfastly maintaining the deadly rule, *stare decisis*, would inevitably be the strongest defense for established wrongs and the greatest obstacle to progress and reform that could be devised. On the other hand, it was early recognized by the forces of restoration and regeneration that their victory could be complete and assured only when this inner citadel of government was in the hands of the people, not merely by right of temporary occupation, but under such conditions that at all times and under all circumstances it should be open to their possession and control.

The fact that there was in the Supreme Court of this state during the years from 1901 to 1910 a judge whose temperament and inclination were favorable to the cause of reform, who possessed the learning and the ability to set forth his statements of fundamental principles so clearly, so logically and so authoritatively that they commanded the respect even of those that held contrary views, became under such conditions a matter of high historical significance and of immeasurable popular benefit. That those statements were the dissenting opinions of a minority judge was of small importance compared with the fact, demonstrated by subsequent events, that they voiced both the opinion and the will of the people of the state.

The basic principle involved in these cases presented for the determination of the Supreme Court was the same that underlay all the other political controversies of this stormy era. It was the principle that lies at the foundation of the American system and the American ideals of government—the principle of the right of the people to govern themselves. This principle was involved in the long struggle against the partisan machines which finally resulted in the adoption of the direct primary and the headless ballot. It was the core of the controversy concerning the right of the executive to use the military arm of the government to enforce a partisan view of the facts and causes of civic disturbance and lawlessness. It was a part of the argument for and against the self-government of cities under the Rush amendment, which, when adopted, became the Twentieth article of the state constitution, and from which later the power to establish the "commission form" was derived. It was concerned in that abuse of legislative power which, beginning with the arbitrary decision of legislative contests upon partisan grounds regardless of the equities of each case, culminated in the partially successful attempt to over-turn by legislative procedure the choice by the people in a general election of a governor of the state. It lay back of the effort to put the control of elections into the hands of the judiciary, thereby removing from the people the responsibility as well as the power of self rule. It prompted resistance to the attempt to impute to the judges of the Supreme Court a superior sanctity and an authority outside of and differing in quality from the delegated authority of the people, the only valid and all sufficient source of legitimate political power. It was associated and closely linked with the nation-wide movement for the direct election of United States senators, as a measure of relief from acts and influences that had greatly increased the evils of machine politics in the state.

In a movement of this kind, extending over many years and involving innumerable controversies, personalities and events, very few of the participants are intelligently conscious of their relations to each other or to the general movement in which they are engaged. Each acts for himself, under the impulse of his own interests or ideals and of the circumstances by which he is immediately surrounded. It is only after the movement has run its course, and the results of the long continued process have been balanced and determined, that it is possible to analyze causes and effects and to resolve the complicated interrelations of persons and events. That is true of the matters now under consideration; yet even amid the most confusing clamor of partisanship and selfish appeal there were some that saw clearly both the basic principles involved and the ultimate dangers that must result if those principles were violated. Nowhere else than in the Supreme Court could the revelation of what lay beneath the surface of passing events have been made with so great an effect, and even there this declaration would have failed of its full force if it had not been free from the suspicion of unworthy motive, partisan bias or improper influence. Later years brought the vindication of Judge Steele's opinions as the voice of the people of Colorado, but even while these controversies were pending there was never any doubt in the minds of those that knew him that he was standing for what he believed to be the best interests of the people of the state and that he was performing conscientiously the highest duty of an upright judge in declaring, without fear or favor, his honest opinions concerning the great principles that ought to determine all political controversies and to guide all governmental activities.

Judge Steele's opinions upon the broad points of public policy, and his appreciation of fundamental principles involved in casual controversies, undoubtedly had an important influence in the final decision of these matters. His powerful advocacy and resolute defense of the cause of the people made him one of the foremost champions of the forces of reform. But his aid to progressive legislation was by no means all his service to the state at this critical time. He was one of the great conservative forces when conservatism was especially needed. His presence in the Supreme Court of the state inculcated respect for that tribunal as a part of the people's government, and demonstrated the way of peaceful amendment as infinitely better than the fatal paths of riot, insurrection, political fraud and extra-constitutional usurpation. It was his mission to prove that the theory of popular self government is neither anarchistic nor disruptive. He voiced no newly discovered or foreign panacea for political ills, but, reverting to the principles laid down by the founders of this government and by the authors of our constitution, he revealed the truth that the new Americanism is nothing else than a restoration of the old. He saw in the demand that the people shall control their public affairs without the interference of legislators, judges or governors simply the claim of the rightful owner to property and powers wrongfully held. Believing that government is, and of right ought to be, the inalienable estate of all the people, he imposed the entire structure of political organization upon the broadest and safest basis, and erected for Law and Order their surest defense against ignorance, demagoguery and the passing storms of popular passion and unrest.

It would not be possible to trace within reasonable limits of time and space all the minor incidents and movements necessary to a complete understanding of the importance of Judge Steele's career in the Supreme Court from 1901 to 1910. Enough has been said to indicate that his work there bore a very intimate relation to the great public events of that period, and that in his official opinions he contributed a powerful, and in some measure a decisive influence for the happy settlement of those most serious and most dangerous controversies.

Some further review of matters previous to that time is desirable for an intelligent appreciation of his ideals, his purposes and his opponents.

CHAPTER II

THE MAKERS OF THE MACHINE

RIGHTFUL rule of the party, in politics, and rightful rule by the party, in government, must be by the will of the majority and for the welfare of the whole. The rule of the machine, in politics and in government, is a rule by the minority, for the benefit of the few.

It is generally understood that the year 1892 marked the beginning of a new era in Colorado. Previous to that time the development of the state had been dependent mainly upon a single branch of one industry—silver mining. The political conditions had been similarly simple, and in spite of the election of two Democratic governors—Grant in 1882 and Adams in 1886—largely on account of their personal popularity, the state was generally regarded as safely Republican upon partisan issues and steadfastly devoted to the principle of a protective tariff.

Other writers have traced the downfall of silver as a standard of value, the disastrous consequences to Colorado business from the closing of the silver mines, the transformation of industry by the development of gold mining, the political revolution accomplished in this state by what was popularly regarded as the betrayal of the cause of free silver, the turbulence and sedition rising to the level of insurrection as a result of labor disputes, and the manifold disturbances and irregularities incident to partisan contests and personal rivalries in politics. It is not the present purpose to stir again the troubled waters of social and political controversies by retelling the story of events that have been the subject of so much furious discussion, but rather to review their general course and to trace the broader and deeper principles involved, in order to arrive at a clearer understanding of the progress that has been made and of the results that have been gained in the settlement of these vital problems.

In the formative period from 1892 to 1900, when events were shaping themselves for a great struggle, and also in the later decade when controversy reached its climax and the issues involved were decided, very few of the participants seem to have realized that the reorganization of industry, the reorganization of politics and the reorganization of government, with the manifold incidents of change, were all a part of one great movement. The events were extremely complicated in their interrelations, but they were all the result of a more or less conscious attempt of the people of the state to adjust themselves to new conditions that had arisen here. Some of these provocative conditions were in the nature of political wrongs and abuses, while others marked the material development of the state and were industrial rather than political.

Previous to the downfall of silver in 1892-93 Colorado was a mining state, and mining in Colorado at that time meant silver mining. Other industries, such as agriculture, manufacturing, transportation, and municipal service were subsidiary to and dependent upon silver mining. The demonetization of silver, with the consequent depreciation of the one thing Colorado had to sell in the world's markets, necessarily meant either the destruction of practically all that had been accomplished here, or the establishment of industry upon a new and different foundation. The desolating experiences of Aspen, Creede, Silver Cliff and Rico indicate what might have been the alternative for the entire state if the people of Colorado had failed to make the most of the opportunities that remained when the silver mines were closed as a result of the acts of the national congress.

Fortunately for the state and for its people, Colorado stands possibly first in the variety as well as in the wealth of its natural resources. The first immediate result of the closing of the silver mines was a rapid development in gold mining, and a slower but ultimately an even more important expansion of the agricultural achievements of the state. In connection with these, industry was stimulated along numberless lines. The cities grew rapidly. Coal mining increased marvelously, giving a sure clew to the manufacturing development of the state. The railroad companies expended enormous amounts in advertising the attractions as well as the resources of Colorado, and the tourist business, the fruit business, the coal business, the livestock business and other branches of traffic transcended the transportation of silver ores and mining camp supplies, which had been the main object of the Colorado railroads when pushing their ways across the broad plains or surmounting the engineering difficulties of cañons and passes.

The population of the state increased rapidly and also underwent a noteworthy change. The earlier inhabitants of Colorado were mostly from the northern states of the Mississippi Valley and the Atlantic seaboard, and American born. Later years brought an increasing number from the southwestern states, not an inferior but a different stock; and there came, too, in these later years a steadily greater number of foreign born laborers, unfamiliar with American institutions, standards and ideals, and easily swayed as the dupes of demagogues on one side or controlled by the agents of wealth, political ambition or special privilege upon the other. The disgraceful Arata riot and lynching in Denver in 1893, the Huerfano County rioting in 1894 involving the United States in an international episode with the government of Italy, and the Leadville miners' strike, which required the active service of the state militia for a period of nine months in 1894, were early evidences of the changing character of the population.

Silver mining of the early days was merely the later stage of prospecting. The successful and the unsuccessful prospector, of similar origin and equal in intelligence and social rank, later became, the one the capitalist and mine owner, the other the wage earner. The pioneer smelters were owned and operated by men who either were mine owners or were in close sympathy with the actual owners and workers of the mines. The early pages of Colorado history are starred with the names of "mining kings" and "smelter kings" who were genuinely men of the people, and their worldly successes, universally held to be the natural prize of their efforts and within the reach of all others of their class, aroused no jealousy or hatred among those who expected some day also to strike it rich.

Previous to 1892 there was not in the Colorado mining districts a laboring class as distinct from the mine owning class. The miners of the early days in Clear Creek, Gilpin and other counties were American citizens who had their full part in patriotic state building. The introduction of large numbers of miners from Missouri and other states who were neither prospectors nor prospective mine owners transformed the conditions of Leadville, Telluride and other districts, while at Cripple Creek, almost from its beginning in 1891, the new conditions rather than the old prevailed. The rapid development of coal mining brought to the state a large number of alien laborers, for those mines were generally owned by large corporations and almost exclusively worked by wage earners who never expected to become anything different from what they were. This industrial reorganization of the state tended directly toward political corruption and machine rule; supplying in the cities and the mining camps the bondsmen and the clansmen of "gangs," "rings" and "combines"; while the recently arrived conservative voters brought from other states their partisan alignments upon national issues and were for a time independent of conditions, needs or dangers in this state.

The early railroads of Colorado were for the most part built by Colorado men for local needs, and they were operated in conformity with local interests. This was true of the Denver & Rio Grande, the Colorado & Southern, the Colorado Midland, and of other lines which, under various names, appear in the early history of the state. It was not true, of course, of those plains roads that were extensions of eastern systems, like the Union Pacific, the Burlington, the Rock Island and the Santa Fe. The part played by the railroads in the development of Colorado has not been fully understood, but it may be said truthfully that it was mainly due to the local railroads that this state took foremost place among western communities in its development, and a large share of its prosperity has been the direct result of an intelligent and liberal policy of railroad building and railroad operation. Public appreciation of the services of such state builders as General Palmer, Governor Evans, Colonel Dodge and others was general. There has never been in Colorado any such feeling against the railroads as has been manifest in many other states, and the absence of restrictive railroad legislation was notable here for many years, after other western states had established commissions with regulating and rate making powers. But in the years from 1890 to 1900 Colorado railroads came to be more and more parts of great transcontinental systems and less and less members of the body of Colorado institutions and industries.

Contrary to the belief in some quarters, the railroads did not play a very important part in politics in the years from 1892 to 1900, but the gradual alienation of those

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powerful corporations from strictly local attachments and their alignment with the great national systems of transportation and finance had a place in the general movement of industrial reorganization in the state and a considerable effect upon other events. In those years railroad companies seldom committed themselves openly to partisanship, their campaign contributions were allotted for business rather than political reasons, and the demoralization of the pass system, like its benefits, fell impartially upon Democrats, Populists and Republicans. In those years, too, the railroads were more often playing the political game in order to secure some advantage over a business rival than combining to protect a class interest against the government or the people. In the culminating struggle of 1904-5, however, the railroads played an important part. Their policy was no longer exclusively industrial, for the furtherance of their own proper business interests through the development of mining, agriculture and manufacturing. They became a part of the system of machine politics, engaged locally in an effort to control government for their own advantage, immunity and privilege, and closely linked with the national masters of finance and politics.

The growth of agriculture in Colorado during this period was of the highest importance, and the agricultural counties were destined to become in later years the conservative and saving forces of the state, both politically and financially. Yet these farmers were then for the most part newcomers, and unfamiliar not only with their social and political circumstances, but also with the conditions of their own industry, upon which their living was dependent. The new settler in the state, whether engaged in solving the problems of dry farming, or learning the practice of irrigation, or devoting himself to any one of the many kinds of specialized agriculture and horticulture, was inclined to leave politics to politicians and the control of state affairs to older residents.

In the period from 1892 to 1900 extraordinary local events resulted directly in strengthening the machine control of parties, and had a most important bearing upon the events of the following period and upon the issues subsequently brought to judgment in the courts and before the ultimate tribunal of public opinion. It was popular disapproval of the Republican course in congress rather than an endorsement of the principles of the Populist platform that gave the vote of the state to Davis H. Waite for Governor in 1892, but four years later the bolt of the Silver Republicans was the result of a deliberate purpose and a sincere conviction of political duty. Wholly apart from the justice or the wisdom of the cause of silver, the political consequences of the revolt of 1896 were far-reaching. Senator Teller in leaving the Republican party took with him the great majority of the leaders and the voters of the formerly dominant party of the state, leaving it in conditions where personal control became natural and necessary, and machine rules and methods were the inevitable consequence.

In Colorado, as in other states, the rivalry for the places of United States senator, under the old system of legislative election, had a most demoralizing effect upon state politics. In some earlier campaigns the struggle between the partisans of Senator Teller and those of Senator Hill was more earnest than that between Democrats and Republicans. If it had not been for the senatorial prize, it is not probable that Edward O. Wolcott would have undertaken the task of keeping alive the Republican organization in the campaign of 1896 and through the subsequent years, and the party rules and customs then established under those peculiar circumstances might not have become the instruments by which the later machine bosses withstood the efforts of the majority of the party voters to secure necessary reforms. If it had not been for Senator Wolcott, the Republican party would have been obliterated in 1896, not merely for lack of voters, but even more for lack of financial support. It was inevitable that the man who paid the expenses of the party should also be its dictator, and thereby was established the precedent that the head of the organization should pay the party expenses, write the party platform and choose the party nominees. Supreme crises in national history have brought dictators, whose first thought was to bring the nation through the stress of events regardless of the means employed. Senator Wolcott was a political dictator, and he left behind him instruments of autocracy ready for the use of his successors.

Senator Teller and his associates unquestionably represented the great majority of Colorado Republicans in 1896; Senator Wolcott represented the minority of those that had been accustomed to vote the Republican ticket in this state, and he also represented the interest of the powerful national organization that elected the president in 1896 and again in 1900, though in both those years the presidential vote of Colorado was cast for the Democratic candidates, and the Democratic candidates for governor were elected in 1896, 1898 and 1900.

The ballot laws of that time required the use of emblems, and the fight for those tokens of party regularity in the campaigns of 1896 and 1898 resulted in new, more exclusive rules adopted by the Republican organization, which were justified in the opinion of the regulars by the necessity of self-preservation; while many of the Silver Republicans who would have liked to see their course and policies approved by the Republican organization felt that the regulars were warranted in adopting extraordinary measures to preserve their control of the party. The main significance of these events lies in the powerful impetus they gave to the personal control of a partisan organization. Senator Wolcott's personal proprietorship of the Republican party lasted but a few years, but the system then established to maintain the party along the lines approved by the national organization became later not merely the instrument by which that party was controlled in opposition to the will of the majority of the party voters, but also the model upon which similar political methods were planned and attempted in the Democratic party. It must be admitted, however, by fair minded observers, that the Democratic state organization never became at any time so subservient to the domination of its self-appointed dictators as was the case with the Republican party.

At the same time and out of the same conditions, the forces of ultimate reform and regeneration were more slowly developed. The revolt of the Silver Republicans, culminating in the establishment of the short-lived Silver Republican party, gave a tremendous impetus to political independence in this state. Many of the Silver Republicans, after a short period of fusion, allied themselves openly with the Democrats, strengthening and stimulating the progressive wing of that party; others returned to the Republican ranks, and others, possibly a majority of the Silver Republicans, increased the number of independent voters who held the balance of power between the parties for many years, swinging the state from one side to the other through a long series of campaigns, insistently urging their demands for reform upon party leaders and public officials, ratifying every measure of progressive legislation presented for their approval, and ultimately consummating the triumph of popular self government, not in or through any one party, but by the force of a persistent and pervasive public opinion.

Another powerful influence and instrument of machine politics developed in the city of Denver, which, comprising a population of nearly one-third of the entire state, passed through a political development similar to that of other American cities. The great public utility corporations, chartered to supply the city with such necessities of civilization as water, gas, electricity, telephone and tramway service, seem to have had less than the usual excuse for entering upon political activities, but they very soon became a constant source of political corruption and civic demoralization, and extremely dangerous to the public interests. Primarily the corporation activities were local, municipal rather than state-wide, but the railroad companies and the larger coal companies, with the smelting companies and the one great steel company of the state, allied in interests with the Denver public utilities, were drawn into political activity from time to time, to a greater or less extent. Doubtless some of the evil that has been charged against the corporations of Colorado was due to the overzeal, the greed, the folly and the blindness of petty officials and agents, who were equally ready to blackmail the corporations or to betray the people, according to which job paid them the best. But the present purpose is not so much to condemn or to condone the political activities of the corporations and their agents as to point out the fact of their interference with the course of politics and government, based upon a policy broadly non-partisan in its scope and having as its purpose the control of the state and city governments by extra-constitutional methods and without regard to the will or the intelligent opinion of the majority of the citizens of the state.

Coupled with the political activities of the Denver corporations, there must also be reckoned the existence of a Denver political machine, which in the efficiency of its work, as well as in its flagrant disregard of law, order and justice, fully deserves the appellation, Tammany, commonly applied to it. There are few worse frauds recorded in the history of American politics than those of the Denver bosses and heelers who established the "Big Mitt" as a term of local infamy. Working usually under the Democratic name, this machine was much wider than the party. It rarely hesitated to sacrifice party interests as well as public welfare to the dictates of personal greed and ambition, and it ultimately became an effective instrument to be used by its bosses and their employers regardless of party principles or even of party advantage. The purpose of its existence was to control government regardless of the will of the people.

Outside of Denver similar political evils existed to a lesser degree. In Pueblo the rule of a partisan Republican machine was prolonged for a time against the will of the majority of the voters by bare-faced fraud. In the counties of Huerfano and Las Animas the rottenness of political conditions has been notorious for many years, with both parties profiting by the disregard of law and neither party bold enough to put a stop to the customary violation of the principles of American free government. In Conejos and Costilla counties the results of elections have depended upon the convenience of a bi-partisan machine rather than upon the opinions of the voters, and too often Conejos and Costilla have determined the results, both in state conventions and in state elections.

An endless list of minor factors might be introduced into the problem, but enough has been said to establish the point that the conditions confronting the people of the state at the beginning of the twentieth century involved something more than a simple choice between two political parties. They were not simply the consequences of the great fight over Silver's Lost Cause. They were something more than the nation-wide protest against corporation interferences in politics and government. They involved much more than the activities of the alleged Socialistic Western Federation of Miners and a mine owners' association that claimed to be engaged in a life or death struggle for the rights of property.

In the ultimate analysis a single purpose animated all these obnoxious activities. The "regular" politician, striving to maintain his organization intact against the will of the majority of the party voters; the Tammany election thief and ballot box stuffer; the political corporation official, attorney or agent; the bribing lobbyist and the bribed legislator; the demagogue who by turns baited the corporations and hired himself secretly to their underhanded purposes; the dynamiter by whomsoever employed, and the advocate of lynch law, whether openly before the mob in the street or with fallacious argument in the courts of the state—all these and many more sought but a single purpose, which was to substitute something else in place of the government according to the freely expressed will of the majority, as established by the founders of the American republic. They sought to control the party as a means to control the government. The petty leader of a factional gang; the boss of a political machine; the usurper of state authority not freely granted by the people's will, were successive steps in the evolution of machine government. Under a specious plea of personal advantage, partisan need or public necessity, the makers of the machine sought, in one way or another, and to a greater or less degree, to impugn and to impair those primitive principles of human liberty which, older by far than the constitution of the state of Colorado or the constitution of the United States, mark the foundation of the entire structure of free government for all peoples in all times.

The greatest service that a judge of the highest court of the state could have rendered to its people in this troublous period was to see the relation between present complicated events and the fundamental principles of liberty and justice, and amid all the intense bitterness and the disturbing clamor of such an era of strife, to hold clearly before the public eye those safeguards of free government for whose violation no stress of the moment can be a sufficient warrant.

Because of his position in the state as well as because of his personal character, his powers of logic and discernment, and the fearlessness of a patriotic and conscientious mind, Judge Steele was able to render this service more efficiently than any other man of his time; and therein lies both the measure of his service to the people and the state, and his claim to grateful remembrance after the animosities, the dissensions and the turmoil of the recent struggle shall have passed away.

CHAPTER III

IN LIFE'S MORNING

Robert Wilbur Steele was born at Lebanon, Warren County, Ohio, November 14, 1857. He was the second of five children, three of whom—himself and two younger sisters—lived to maturity, while an elder sister and a younger brother died at an early age.

Some men take pleasure in advertising their ancestry, seemingly hoping to divert attention from their own lack of merit by exalting the virtues of their forefathers. Judge Steele, in later years, was accustomed to emphasize the American principle that it is what a man is and what a man does that really count in this world. Yet if there is any truth in the theory of heredity—and few will deny that it is at least one of the elements that go to influence, if not to determine, character—the parents of Robert W. Steele might have based a confident expectation of a useful and honorable life for him upon their knowledge of the character, the attainments and the public services of members both of his father's and his mother's families.

He was the son of Dr. Henry King Steele and Mary Frances Dunlavy Steele. His father's parents were Dr. John Steele and Cornelia King Steele, the descendants of pioneer settlers of Ohio and Kentucky. Born in Dayton, Ohio, April 1, 1825, Dr. Henry Steele was educated at Center College, Danville, Kentucky, and won his degree of medicine and surgery at the University of New York. At the age of 32, when his son, Robert, was born, Dr. Steele was building up his practice in the town of Dayton and rapidly winning a place for himself as a physician and a man in that community.

Dr. Henry Steele's father was Dr. John Steele, a prominent physician of Dayton, who came to that town in 1812 from Kentucky, where his father, Robert Steele, had been one of the founders of Transsylvania College at Lexington. (See genealogical note below.)

Chief Justice Robert W. Steele of Colorado was not, however, named in remembrance of his great-grandfather of Kentucky, but for another Robert W. Steele, who was the son of Judge James Steele and the nephew of Dr. John Steele, and who was for many years prominent in the affairs of Dayton as a patriot, scholar, author and philanthropist. Having studied to fit himself for the practice of the law, this elder Robert W. Steele, upon the threshold of an active and successful career, was forbidden by his physician to continue his studies. "Very well," he is reported to have replied; "if I cannot do my work in the world as I have

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GENEALOGY OF ROBERT WILBUR STEELE

I

Robert Wilbur Steele; born November 14, 1857; died October 12, 1910.

II

Dr. Henry King Steele, 1825-1893; married Mary Frances Dunlavy, 1831——.

III

Dr. John Steele, 1791-1854; married Cornelia King, 1803-1879.
John C. Dunlavy, 1796-1834; married Katherine Latham, 1800-1876.

IV

Robert Steele, 1738-1801; married Agnes Coulter, ——1814.
Henry King, 1765-1837; married Charlotte Morrell, 1767-1816.
Francis Dunlavy, 1761-1839; married Mary Carpenter, 1764-1828.
——— Latham; married Anna Carmichael.

Robert Steele (IV) was the son of Andrew Steele of Rockbridge County, Virginia. Agnes Coulter was the daughter of James Coulter, also of Rockbridge County.

Henry King (IV) was the son of Frederick (1738-1796) and Mary (Ayers) (1762——) King; Frederick King was the son of Constant (1712-1783) and Phoebe (Horton) (1715-1787) King; Constant was the son of Captain John King.

planned, I will help others to do theirs." The Robert W. Steele high school building in Dayton, occupied since 1892, is a monument of his service to that city and its people.

Mary Frances Dunlavy Steele was the daughter of John C. Dunlavy and the granddaughter of that Francis Dunlavy who was president judge of the First Circuit Court of Ohio and the first judge appointed to office in that state. She was a native of Lebanon, where her father died while she was a young girl, and where she lived until her marriage to Dr. Henry K. Steele.

Shortly after Robert's birth his mother returned to her home in Dayton, and his earliest years were spent in that place, which was then, as it is now, one of the most pleasant towns of southwestern Ohio. The time was that of the troublesome period immediately preceding the great Civil War, and the problems of national policy and national organization that already divided the sections and threatened to destroy the structure of the Union were pressing hard for settlement. No one was more vitally concerned in the questions then under discussion, and soon after fought to a tragic conclusion, than the people of the border states. The shadow of a great conflict already lay over the lives of all the nation, and especially of those men and women whose ties of family, friendship and business extended across the political boundaries fixed by mountain and river between the North and the South.

It is an interesting fact that the children of the war time, including those born immediately before that period of strife and hatred, as well as those born during those terrible years, seem to have inherited, or to have breathed in from their surroundings in their earliest days, more than the common hatred of war and more than the common tolerance of opposing political opinions, coupled with the belief that human differences of politics, philosophy and religion are capable of peaceable and honorable adjustment. There are not many stories of those early years, but no woman who experienced at that time what war really meant failed to offer her prayers that the nation might forever be spared another such visitation of wrath; and no boy, growing up amid the sorrows, the sacrifices, and the tremendous emotional intensities of such a period, could have failed to receive, upon the one hand, a baptism of patriotism, and upon the other a lasting impression of the horror and the folly of war. Such early influences, though received at a time when the child is too young to have a conscious knowledge of political events, or to preserve definite memories for future years, often have a profound effect in the determination of character, and doubtless some traits of the future chief justice of Colorado might be traced to war times in Ohio. True it is that prominent among his characteristics was a warm and eager patriotism, ready at all times to make the welfare of the nation and the state the primary test and measure of every political act, and true it is also that the arbitrament of the sword and the course of violence never found encouragement from the acts, the counsel or the judicial decisions of Robert W. Steele.

The time came, as it came in all the homes of the land, south as well as north, when the father and the husband had to decide which should come first in the line of duty, the nation or the home. Doctor Steele made his decision and offered his life and his professional knowledge and skill to the Union. As surgeon of the Forty-fourth Ohio infantry and later of the Eighth Ohio cavalry, Dr. Henry Steele served his country with the same loyalty and fidelity with which his father, Dr. John Steele, had cared for the sick and wounded in Dayton's military hospital in the war of 1812.

During most of the war time Robert Steele lived in Dayton. A part of the time he was in Lebanon, and a part in Hamilton, and twice he went for short periods across the river into Kentucky, where Doctor Steele was stationed for his work as an army surgeon.

It was in Dayton that Robert had his first experience in school, and it was in Dayton, too, that he made his first effort in the business world, an incident characteristic of the boy that was "father of the man." Robert, so the family story runs, like other boys of his acquaintance, wished to sell upon the streets the papers containing the latest war news, and, getting a number of copies fresh from the press, was soon at work. After a time he came home, happy and successful. His pleasing manner and personal charm had won the notice and approval even of strangers, and he poured his accumulated store of pennies into his grandmother's lap, and never cared to ask for them again. It was doing a work in the world, acceptably and successfully, that delighted him, and not the money he gained thereby.

Also characteristic of him in this period was the favor with which he was regarded by all his relatives. He was a boy whom everyone liked, and in the frequent changes that came into his life in the early years he possibly acquired, much sooner than most children, the ability to meet new people and to make friends easily.

Another story is illustrative of a different kind of influence and another line of thought. A great fire among the wooden buildings seemed to threaten the entire town with destruction. Terrified by the roar of the fire, the glare that lighted the sky and the brands that fell far ahead of the leaping flames, Robert rushed into the house, crying to his grandmother: "Come quick! Get down on your knees any pray that the fire may be stopped, or we shall all be burned up!" Such childish faith and zeal had an immediate reward, for the grandmother complied with his request, though the ultimate result remains unrecorded.

It was in the Dayton period, too, in the years following the war, that Robert showed very clearly his fondness for political affairs, a characteristic that became one of the controlling elements of his career. At an age when most boys find their chief delight in the noisy sports of the playground, or in such amusements as the circus or the more modern moving picture show, Robert Steele took to politics. Like other boys, he was attracted by the noise and the color that marked the campaigns immediately following the war, the bands and the gaudy uniforms and the torchlight processions and the stump speeches, but he had further a sincere interest in the political questions involved and the public interests that were at stake in these discussions. The reasonableness of his thought may be illustrated by a single incident. He was usually an obedient child, but once, after having forbidden Robert's attendance at a political meeting, his father was surprised to find him sitting in the front row and listening with marked attention to the arguments of the speaker. After they had returned home his father said to him: "Robert, didn't I tell you you shouldn't go to that meeting?" "Yes, father," was the logical reply; "but I thought there was no harm in my going where you did."

In a recent letter, Mr. Charles J. McKee of Dayton gives an interesting reminiscence of those early years:

> "As a student Bob held a good record, but never, to my knowledge, excelled in a high degree. I believe he was always industrious and conscientious in his work. He even at that age differed from most of us in being a steady reader of newspapers, and I can remember that at times when we would ask him to join us on some excursion of sport we would have to wait until he could finish his perusal of the news of the day. This was a marked characteristic in him, and I can say that he had a far better knowledge of what was going on than any of us, and this extended into public affairs and matters of politics with which we as boys had absolutely no concern, but which seemed to interest him in more than an ordinary

degree. He was not dependent on his fellows especially in matters of judgment or opinion and often went his own way alone."

Although he was not afflicted with sickness other than the ordinary illnesses and ailments of childhood, Robert Steele was not a robust boy, and for a time his father, watching him with the careful eye of a skilled physician, was anxious about him. Like other veterans of the war, Doctor Steele had returned to his home to find his practice gone and the necessity before him of opening new ways of business. For some years he remained in his old home in Dayton, but in 1870, for business reasons and even more because of what the New West of that time had to offer for his son in the way of better health and future opportunities, he resolved to come to Denver, and arrived in this city in the late summer of that year. His family, consisting of his wife, son and two daughters,* followed two months later, coming by way of the newly completed Kansas Pacific Railroad from Kansas City. Colorado has been good to many newcomers, but very few of them have had their faith and hope in this state better rewarded than Doctor Steele and his son.

The year 1870 is generally recognized as marking the transition from the old to the new in Colorado. In that year, on June 15, the first track of a railroad was laid into Denver, and on the 24th of the same month, the coming of the first locomotive, via the Denver Pacific from Cheyenne, was properly celebrated in connection with the formal driving of the last spike. On August 15, 1870, the second railroad, the Kansas Pacific, completed its line to Denver. In the same year the first gas plant was constructed, and the first system of domestic water supply, outside of the primitive wells, was established. Small wonder, amid so many evidences of substantial progress, that the growing community dropped the pretentious title of Denver City and thereafter faced the world upon the solid foundation of real accomplishments as Denver. The federal census of that year marked the population of Denver at all of 4,759, and proved to be the same disappointment to its inhabitants that all subsequent census counts have been, but the people quickly consoled themselves for their disappointment with the complacent assurance that before the end of that year enough new people had come to town to make its population fully 5,000.

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*Harriet D. Steele, married to John C. Murray; Mary F. Steele, married to William M. Spalding.

From this same year of 1870 also dates the beginning of the real and general development of the resources of Colorado. The territory had been organized in 1861, but it was not until May, 1870, that the arrival in Denver of the advance guard of the Greeley colonists signalized the start of the agricultural development of the state. Colorado Springs and Loveland were founded in the following year.

The fact that Doctor Steele and his son Robert, then a boy of 13, came to Colorado at this particular time is recorded as something more than a mere coincidence of events, for the period was one of unusual opportunities and influences. The year distinctly marked the passing of the era of the pioneers, and the beginning of the era of development. Doctor Steele and his young son were typical of two important classes of state builders, the one of the men of ripe experiences and mature powers, who laid the foundations of the new state with the wisdom gained in older commonwealths, and fixed the institutions and the sentiments of the new community in close bonds of sympathy with the great federal union; the other of the younger generation, born east of the great river, but coming to the mountain state young enough to be thoroughly western in spirit and becoming themselves the first fruits of a truly western education and developing a genuine and distinctive western patriotism and ideals. Not until many years later did the generation of Colorado's native sons come to have a primary influence in the affairs of the state, but it may be truly said that of the many children who have accompanied their parents inward across the Colorado boundaries, none has been more truly a child of Colorado, loyal, patriotic, intensely devoted not merely to her material welfare, but also to the establishment and maintenance of high ideals of citizenship and civilization, than Robert W. Steele.

Of the many influences that wrought toward the shaping of the character of the boy, and later of the man, none was more important than the father, whose care for the physical well-being of his son was responsible for the transplanting of the youth to the West. Doctor Steele was a man of extraordinary personality and ability, and his qualities quickly found recognition in the rapidly growing community of Denver. In a memoir that was read before the Denver and Arapahoe Medical Society shortly after Doctor Steele's death, Dr. Henry Sewall, who knew him well, thus describes him:

> "Arriving here in 1870, when Denver had just reached the legal age of manhood and six years before the territory of Colorado had matured into statehood, he was truly a pioneer in all that pertained to the upbuilding of the city and the state. So well was his ability appreciated by the laity that he was able after seventeen years to retire from active practice in comparative affluence. We who knew him personally, therefore, gave to him freely that respect which is only granted to one who has left the present strife with all his powers intact. For many years his personal appearance was more venerable than his age would warrant. The fringe of fine, white hair about a massive head; the keen but kindly eye, rarely without its twinkle of humor; the direct and honest look, all at once won the confidence of the stranger and led the mere acquaintance to seek to become a friend. No phrase so well depicts our conception of Dr. Steele's make-up as 'old-fashioned.' His disposition was peculiarly child-like. Sober reflection was his mental habit, but he was saved from melancholy by a humor which lightened every passing event. His extreme modesty would have resulted in vacillation and timidity in one less fully endowed with moral and physical courage, and was

one of his old-fashioned charms which covered a reserve power that was only disclosed now and then as emergencies requiring decisive action arose."

In 1879 Doctor Steele was appointed a member of the State Board of Health, and in 1891, when the same board, which had been allowed to drop out of existence, was re-established by Governor Routt, Doctor Steele was reappointed to its membership. Soon after his arrival in this state, he organized the Colorado Medical Society, in 1871, and in 1875 he was its president. Beginning in 1877 he served for a number of years as the first dean of the medical department of the University of Denver, and his name appeared upon its faculty roll as professor of the principles and practices of surgery and clinical surgery.

Undoubtedly Doctor Steele's most important public service was as health commissioner of the city of Denver. He was first appointed to that position by Mayor Platt Rogers in 1891, and continued to occupy it until his death in 1893. No better measure of his good work in this office can be had than the statistics of the death rate for the city. In the year preceding his appointment the deaths had been 23.7 per thousand, largely as a consequence of bad water supply and other unsanitary conditions. In the first year of Doctor Steele's work as health commissioner the death rate fell to 18.6 per thousand, and in the second year there was a further decrease to 14.27 per thousand. For his services in this office Doctor Steele steadfastly refused to accept any pay, and gave his time and effort freely for the city's good.

At the time of his death, which occurred January 20, 1893, Doctor Steele was greatly interested in the problem of caring for sufferers from contagious diseases, some of whom had died and many of whom had been woefully neglected as a consequence of inadequate facilities for their proper treatment. He had urged the city authorities to build a permanent hospital for the care of such cases, and at the time of his death it had been completed according to his plans and was ready for occupancy. Fitly named the Steele Memorial Hospital, the building stands today as a permanent token of the public appreciation of the services he gave to the city and of the universal respect and esteem with which he was regarded.

The following resolution was unanimously adopted by the Board of Supervisors of the City Council of Denver February 20, 1893, and by the Board of Aldermen February 9, 1893, and was approved by the Mayor February 21, 1893:

> *Whereas,* The late Dr. H. K. Steele was chief officer of the Health Department of the city and gave freely and without charge his efficient service in organizing and placing the Health Department in its present efficient condition;
>
> *Therefore,* Be it resolved by the City Council of the City of Denver, That the hospital heretofore established by the Board of Health on the northeast corner of Seventh avenue West and Evans street for the purpose of an isolation hospital, be and the same is hereby named the Steele Memorial Hospital, and shall be so styled in all official documents upon and after the passage of this resolution.

Whatever else may have been the boasts of the budding metropolis of the West, Denver could not claim distinction in 1870 because of the excellence of its school system. It was not until seven years later that the first high school class in Colorado was graduated, and of that class Robert Wilbur Steele was an honored member.

Some of the activities of the intervening years are worthy of special mention. Robert Steele had not been many years in Denver before he began to earn money for himself. One of his earliest jobs was at the Union Bank, where he swept out the office and made himself generally useful. He also acted for a time as collector for Doctor Williams, who was associated in professional work with Doctor Steele, and from the age of thirteen he earned all his own spending money.

To this period also belongs another set of experiences which were destined to have an important bearing upon his future ability and success. Soon after Doctor Steele's arrival in Colorado, some cousins of his bought a ranch in the eastern part of the San Luis Valley, near Villa Grove, and there for several years Robert spent his summer vacations. The outdoor life and exercise were of incalculable value to him. He rode horseback, he drove cattle, he fished and hunted, he did all that a boy may do in the country in the summer time, and, above all, he absorbed immeasurable quantities of bright Colorado sunshine and breathed without limit the pure air of the Colorado mountains, until kindly Nature had more than redeemed the promises that had attracted the anxious father to this state. From those boyhood experiences he first gained that love of Colorado scenery and of the free life of outdoors, the life of the ranch and the camp, which was characteristic of him through all his remaining life. In those experiences he laid the foundations of sound health which enabled him in later years to carry the burdens of an exacting profession and to win the highest measure of success in his life's work.

In high school Robert Steele was not what might be called a thorough student. His father wisely discouraged any such devotion to books as might be prejudicial to health, and it was understood by his teachers that he was not to be crowded in his school work. The high school was first organized in the fall of 1874 for a three years' course, by Professor Aaron Gove. The principal for the first year was a Professor Freeman, and for the other two years Professor James H. Baker, later president of the Colorado State University. Many teachers participated in the instruction of the class of '77, but among them all none had a greater influence, as a teacher and as an individual, than Miss Nannie O. Smith, who later became Mrs. D. C. Dodge.

In later years Judge Steele often spoke in highest terms of her work as teacher, and gratefully acknowledged the inspiration and help he had received from her counsel and instruction. Another loving teacher was Miss Overton, who later married Mr. J. S. Brown. There were seven students that graduated in this class, the number including, besides Robert Steele, Mrs. Mary Peabody Dickerson, Mrs. Seraphine Eppstein Pisko, Mrs. Flora L. Bishop Stevens, Mortimer Arnold, General Irving Hale and Frank S. Woodbury.

Robert Steele is best remembered by his classmates of the old Arapahoe street high school for the charm of his personality and for his ability as a speaker. He had all the qualifications for a great orator except self-assertion. says one of his schoolmates, and some of his declamations are even yet clearly remembered. Even then his sense of justice was remarkable, and it is said of him that his perception of right and wrong was more prompt and more infallible than that of any of those with whom he was associated.

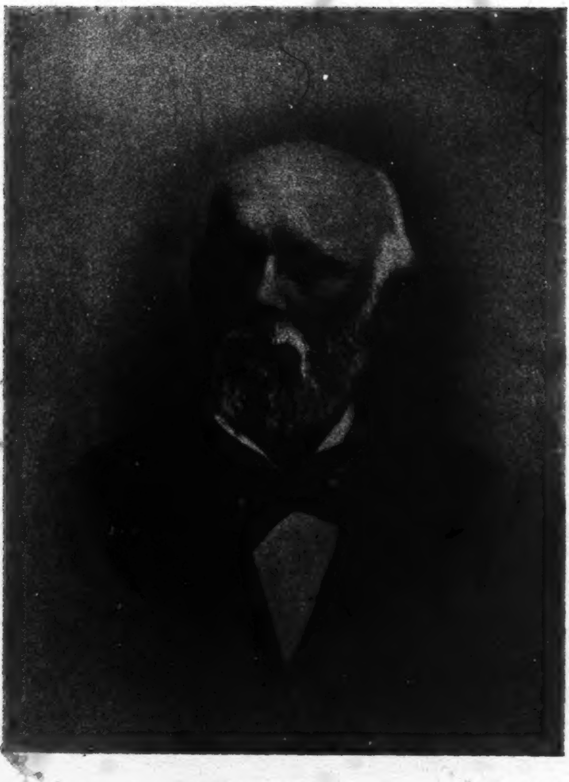
The test of oratorical ability in that time and place was the Woodbury prize, established by R. W. Woodbury, founder of the Denver *Times* and father of Frank Woodbury of the class of '77. The third Woodbury contest, held June 14, 1876, was won by Robert Steele, who declaimed Webster's famous oration in reply to Hayne. Upon another occasion when Robert Steele was a speaker in a contest, Doctor Steele, who was a member of the school board, was one of the judges, and had to cast the deciding vote for or against his son. Robert lost the medal, but one of the other judges was so pleased with his effort that he gave a special prize to Robert. Many years after, it is pleasing to record, under somewhat similar circumstances, Justice Robert Steele of the Supreme Court bestowed a special prize upon the granddaughter of that favorable member of the school board.

A classmate of the high school tells the following story illustrative of a boy's mischievous logic: "A circus parade was passing the high school and the pupils were craning their necks to look out the window. Professor Baker, thinking to suppress this, suggested sarcastically that Steele could see better if he would go to the window. Steele thanked the professor cordially, went to the window, and saw the whole parade."

Although not a close student, Robert Steele at this time began to show more than a common fondness for books, and while yet in the high school began the collection of a personal library which later served as the source of learning and culture as well as a favorite occupation for his leisure hours. History, of the United States and especially of the West; political biography, and volumes upon the theory of government and the sources and development of law, were the classes of books he liked most. He was not oblivious to fiction and poetry, but his choice in those lines was for the best masters of literature, and he read them for mental pleasure and refreshment rather than for stimulation and development.

His improving health and growing fondness for outdoor life was evidenced in that period by his membership in a semi-professional ball team, the only uniformed club in Denver, known as the Brown Stockings. His position was that of left fielder, in which he distinguished himself honorably and often successfully in encounters with similar teams from Cheyenne and other cities.

Chief of the characteristics of these school days, however, was his interest in politics, which was coupled with that facility of making friends which is at once the prime need and the unmistakable mark of the political leader of



DR. HENRY KING STEELE

men. Sincerely democratic in his thought and attitude toward others, affable to all of whatever rank or station, just in his judgments yet always willing to find an excuse for the weak or misguided, he had all the dangerous weapons of the demagogue, yet without any of the demagogue's disposition to use them wrongfully. He was interested, though not so profoundly as in later years, in the fundamental principles and problems of government; he had a lively and active interest in men as men; and he was also interested in the practical problems of political organization and in the results that may be accomplished by the union and co-ordination of individuals in political parties. He was "in politics" many years before casting his first vote, and he not only had an inside knowledge of what was going on, but his opinions and his suggestions began to receive consideration at an age when most boys are getting their ideas of politics from the civil government text books of the high school.

Robert Steele's oration, delivered upon the occasion of his graduation from high school, is still preserved. Its subject was "Red Tape," and persons then present now recall the effect produced by its delivery. A few sentences here quoted will serve to give some idea of his mental development at that time and of his processes of thought:

> "System is the perfection of all law. * * * While we humbly bow to the irrevocable laws of God and submit with cheerful obedience as lawful subjects of His power, we are not prepared to say that all human laws are for the best and should not be changed or violated. Our advancement in science, our progress in knowledge, the intellectual development of the age demand a change in many things, and what we think are facts and theories firm and unchangeable may be entirely subverted as the light of science is reflected upon them. * * * The manner of conducting the business of the government of the United States is belittling to statesmanship, discreditable to all parties and injurious to all politics; for the officialism of our government, besides being stupid and habitually slow, is corrupt. * * * Let us instruct our Congressmen, then, to aid him [President Hayes] in his noble work of reform

and in their halls consecrated to the Union to 'perform a solemn lustration.' Let them wash the slime of partyism and corruption from their hands. Let them dissolve all party ties and free the country from the poisonous sting of ring hirelings; and, finally, let them close forever the approaches to internal feuds, and on their altars, in the presence of that image of the Father of His Country that looks down upon them, swear to preserve honorable peace with all the world and eternal brotherhood with each other."

In choosing the legal profession for his life's work Robert Steele was following both his natural inclination and the logic of circumstances. Heredity might have led him either toward medicine or the law, but he lacked the robust physique necessary to success as a practising physician and surgeon. His temper of mind and his taste in reading pointed directly toward legal study. His ability as a speaker was another important qualification, and, most of all, his inclination toward politics and his capability for public life, as evidenced by his extraordinary power of winning the approval and confidence of those with whom he came in contact, inclined him toward the profession that is in America the most usual avenue toward preferment and success in public life. There must have been some manifestation of this preference previous to his graduation from high school, since it is remembered that Judge E. T. Wells had already expressed to Doctor Steele a willingness to receive Robert as a student in his office. A short time later Judge Wells resigned his position on the bench and resumed his practice, and Robert Steele began the usual course of reading to prepare himself for admission to the bar. At that time the firm of Wells, Smith & Macon was recognized as one of the leaders of the Colorado bar, Judge Wells having as his partners Edmond L. Smith and Thomas Macon.

The first taste of legal lore was evidently pleasing to the student, for the following year he entered the law school of Columbian University (now the George Washington

University) of Washington, D. C. Before the end of his second year in the East, however, it was thought advisable, on account of that unfavorable climate, that he should return to Colorado. A simple story is told of his residence in Washington which is thoroughly characteristic of the humanity and unselfishness of his nature. His boarding place in that city was far from perfection, but it was conducted by a widow who was having a hard time to make a living for herself and her children. And Robert Steele put up with the delinquencies and discomforts of her board and lodging rather than add to the burden she was carrying.

Returning to Colorado in 1879, he entered again the law office of Wells, Smith & Macon, and devoted himself to his study with such attention that in 1881 he was admitted to the bar. One who knew him in that stage of his career many years later thus expressed his memories:*

"I recall his studious habits and modest demeanor and became much attached to him because he was an uncommon young man, always a gentleman—such as a correct understanding of that word always implies—and always striving to perfect himself in that science, law, which is most exacting of old and young members of the bar. That for which, perhaps, Judge Steele has been most noticeable was judicial courage and integrity; painstaking, unprejudiced investigation of all questions before the court; always profoundly impressed with the great duties imposed upon a judge of our highest court. Political eminence and professional fame disappear within a short time, like the mists of the morning. Nothing of character is permanent but virtue and professional worth. Those remain."

No young attorney of Denver ever entered the open door of his chosen profession with brighter prospects than Robert W. Steele. He had, as has been shown, very many of the qualifications of a brilliant and successful lawyer and politician. He was a most charming and effective speaker, his circle of friends and acquaintances included practically everyone worth knowing in the Denver of that time, and many of the most prominent and most influential men of the city felt a double interest in his welfare, for his father's sake as well as for his own. But the service that Robert Steele was to render to the state and its people was not to be that of the attorney in civil or criminal cases. A wider and higher mission was in store for him, and a kindly fate, blocking the path of progress in the natural line of his profession, led him by a longer way through the experiences necessary to his development and brought him ultimately to the position that he was destined to occupy.

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*Judge D. P. Wilson.

To some of his friends, who believed that they knew what was best for the young attorney and who hoped to see him rise rapidly as well as highly in his profession, it was a distinct disappointment when, in 1881, soon after his admission to the bar, he received and accepted an appointment, by the Board of County Commissioners, as clerk of the County Court of Arapahoe County, of which Denver was then the county seat. The somewhat monotonous duties of this clerical position mainly occupied his attention for three uneventful years. During this time he continued his reading of law, history and general literature, he displayed an active interest in public affairs, and he never ceased to concern himself in those political activities that are at once the implements of statecraft and the instruments of government.

In 1884 he resigned his position as clerk of the County Court in order to engage in the practice of his profession.

CHAPTER IV

THE BUILDERS

EVERY intelligent citizen of the New West in America is more or less consciously a Builder. The charms of the wilderness and of the frontier have always operated to draw bold and adventurous spirits toward the untrodden parts of the earth and have been among the strongest influences for the extension of civilization and the subduing of the continents to the uses of man. But the nineteenth century brought to the men of western America a fresh and a higher civic conscience, a stimulating sentiment of responsibility for laying the foundations of politics and industry upon which was to be erected the structure of the commonwealth of the future. The great inventions of the age made it possible to forward development at a rate never before known, and at the same time they impressed each successive step of that development upon the minds of the people. The states and nations of Europe were evolved by centuries of unconscious and often purposeless growth; the states of western America were built by decades of strenuous effort, consciously directed toward those ideals of "progress and prosperity" that were the purpose of "Booster" activity everywhere.

At no other time and in no other place was this consciousness of civic duty more keenly felt than in Colorado in the last quarter of the nineteenth century. The young man who came to maturity in Denver at that time could not fail to be impressed with the material advantages of the state, its superior climate, its wealth of natural resources and their even more marvelous variety, and to share in the conviction, which possessed the thought of the entire community, that Colorado is destined to extraordinary accomplishments in mining, in manufacturing, in agriculture, in commerce and in all the activities of a highly energized, intelligent, prosperous and progressive state of the American Union.

To such a young man as Robert Steele, the descendant of the successful pioneers of older and vanished frontiers, the opportunities of the New West spoke with paramount force. He saw clearly the opportunity to win for himself, in the manner of employment to which he was best adapted, those personal results that seem desirable to every intelligent human being—home, family and fortune; he saw the opportunity to achieve, in his chosen career, unhampered by the restrictions of an older civilization, those honorable rewards of sincere and successful effort that are the highest prizes of republican citizenship; he saw the opportunity, higher than personal fortune, greater than personal fame, to have a part in securing the happiness and well-being of future generations and to make himself inseparably a portion of the heritage of liberty—an opportunity that the state builders of Colorado were preparing to hand down to their children and grandchildren.

Modest as he was, with an inherited aversion to self-assertion or self-display, and with a characteristic distrust of his own personal merit and ability, there is no ground for the belief that Robert Steele had any prevision of the height to which he would ultimately reach in the regard of his fellow citizens and in the service he would render to the state. But there is no doubt whatever of his loyalty to Colorado, of his sincere conviction of her surpassing merits as a place of residence, or of his intelligent appreciation of the material opportunities for business and professional activities; and it is even more certain that very early in his career he fixed, as the supreme goal of his life-purpose, the welfare of the people rather than any personal gain of wealth, position or fame for himself.

Already an independent money earner by his own choice since early school days, he now set himself resolutely to the task of establishing his position in the world, to the primary duties of manhood and of citizenship.

Throughout his high-school days Robert Steele had maintained a reputation of indifference toward the other sex. He had passed his hours of leisure in the circles of politics rather than in those of society, and had preferred the amusements and pleasures of the open field to those of the parlor and ballroom. In the summer of 1883 he became engaged to Miss Anna B. Truax, daughter of Perry B. Truax, of Toledo, Ohio, who was at that time visiting relatives in Denver. Their marriage followed on February 28, 1884, at Toledo. Originally a "love match," marriage brought to them neither disillusion nor bitterness. The young bride was most cordially welcomed to the circle of relatives and friends in Denver, and home life for Robert Steele began under favorable auspices which the future nowise disproved.

Two sons, Henry and William, and a daughter, Frances Edwina, died in early childhood, while another son, Robert, born in 1891, and a daughter, Jane, are now living in Denver.

The routine of clerical duties in the County Court, however faithfully performed, failed to satisfy Robert Steele long after his marriage. In the fall of 1884 he resigned that position, and, forming a partnership with William H. Malone, under the firm name of Steele & Malone, he entered upon the practice of law. The first office of the firm was in the Tabor Opera House, at that time easily the finest business block of the Rocky Mountain region, but the office was later removed to the Jacobson Building, and still later to the Beckwith Building, on the north side of Champa street, between Sixteenth and Seventeenth streets. For a number of years the Beckwith Building was owned by the firm and was occupied by it for office purposes until Robert Steele was removed from private law practice by his election to the position of district attorney.

The new firm was rapidly successful and soon came to be regarded as ranking high among the younger attorneys of the city and the state. One of the earliest of its cases involved important property rights in both water and land at Sloan's Lake, near Denver. The case was won by Steele & Malone upon the first decision, but upon a rehearing the decision was reversed. Possibly as a result of the effort devoted to this case and the interest it aroused, the firm soon came to give special attention to land cases. This interest was further intensified in the second year of his practice (1885), when Robert Steele received the appointment as land attorney for Colorado for the Atchison, Topeka & Santa Fe Railroad Company.

The Santa Fe railroad had crossed the Colorado boundary in 1873, its terminus being for a time at the town of Grenada, Colo. In 1875 it was extended to La Junta, appropriately christened as the junction point of the Colorado branch with the main line extending westward through New Mexico. Continuing up the Arkansas Valley, the Colorado division reached Pueblo February 26, 1876, and the extension northward from Pueblo to Denver was completed in 1887. The town of Rocky Ford had been founded in 1871 by George W. Swink, for many years one of the leading men of the Arkansas Valley and a successful pioneer in the development of that region. There had been already some agriculture under irrigation at Garden City, Kansas, seventy miles east of the Colorado line, and in 1886 the conditions seemed favorable for a rapid growth in wealth and population of the Arkansas Valley in Colorado from the Kansas boundary to the mountains, at Cañon City.

As land attorney for the railroad company, Robert Steele was in close touch with the enterprises started or planned in that region, and in 1886, when it was judged advisable to establish a new town in the valley between Garden City and Rocky Ford, he was named as one of the incorporators, the others being J. E. Frost of Topeka, Kans., I. R. Holmes of Garden City, J. E. Godding of Lamar and William Malone of Denver. The name of the town was chosen by Robert Steele, and in honoring the then secretary of the interior, Hon. J. Q. C. Lamar, the shrewd attorney was not overlooking the fact that, besides choosing a good and euphonious name for the town, he was getting in line for some first-class advertising. The town company was organized with Col. A. S. Johnson as president and was very promptly successful. By an article appearing in *The Prairie Farmer* in May, 1886, and written by Orange Judd, we are informed:

> "Only five short weeks ago there was not a sign of human habitation in sight save a single log building down by the cottonwood belt that fringes the stream. From the river southward a desert-looking plain, partly covered by the short buffalo grass, extended up a gentle incline two or three miles. The land was mainly open to pre-emption and homesteading. Today there are five and twenty buildings completed or nearly so; many others are begun and active preparations are making to erect a large number more. Tens of thousands of dollars' worth of lots have been sold, $400 to $600 and upwards being paid for a plat with a twenty-five foot frontage on the principal street. * * * The land on all sides is held at a premium of $500 to $1,000 per quarter section, which the owners 'filed upon' within a month. Twenty-five foot lots in town are jumping up a hundred dollars a day. * * * There is no question as to the substantial value of property in that new Colorado wonder. It lies in the heart of a good country, far enough from any other large city and having all the advantages to make it great. It will be a second Garden City, and this is the judgment of business men who have visited this part of the country. He who owns property in Lamar has 'old wheat in the mill.'"

The progress of a quarter of a century has justified the expectations of the founders of Lamar. Thanks to its central location, the energy of its friends and possibly to the benevolence of the high official whose name it bore, Lamar promptly became the seat of the United States land office for the lower Arkansas Valley in Colorado. In April, 1889, by act of the general assembly it was established as the county seat of the new county of Prowers, and has continued ever since its development as one of the best and most uniformly prosperous agricultural towns of Colorado.

The active interest of Robert Steele was not, however, confined to Lamar. Some of the best land opportunities of the valley were found to exist in the western part of old Bent County, which was established as Otero County with the county seat at La Junta, in the same year that Prowers County was created, and the firm of Steele & Malone became one of the large land owners in the vicinity of Rocky Ford.

In 1885 Robert Steele had bought the lots at the southwest corner of Eleventh avenue (then known as Deer street) and Washington street, in Denver, and promptly began the building of a residence. At that time the site chosen was well outside the city, and even while the carpenters were at work the cowboys were herding cattle in the vicinity. Yet so rapid was the growth of the city that when the house was completed, in 1886, the street car ran as far as that corner, and the city water and gas services were ready for the use of its occupants. This quick reward for foresight and good business judgment came to one who had steadily professed and maintained his faith in the future of Denver. His father, Doctor Steele, promptly after his arrival had linked his fortunes with the welfare of the city. The old Steele residence, at the eastern corner of Sixteenth and Stout streets, stood for many years in the heart of the residence district of Denver. That dwelling gave place in 1882 to a two-story business block, to which a third story was subsequently added, and this later structure still holds its place in the heart of the business section of modern Denver. Robert Steele fully approved his father's views as to the future growth and stability of Denver's real estate values, and strongly expressed his convictions regarding the political and commercial capital of so rich and so extensive a territory. At a later time, when the opportunity came, as agent for his father, to dispose of that property, he gave further proof of the sincerity of his opinions by using his influence to retain its ownership, in spite of the unfavorable conditions then existing—a judgment fully justified by subsequent events.

In 1888 Robert Steele's growing familiarity with the legal side of the land business brought to him one of those exceptional opportunities that sometimes arise in the newer states. In order to promote the construction of the transcontinental railroads, congress had made very liberal land grants to the companies, giving them alternate sections of land for a considerable distance on both sides of their tracks. Although this land was then a part of the wilderness and much of it lay within the borders of the so-called "Great American desert," it rapidly became of great value and finally far surpassed the entire cost of building those railroads. These lands were, for the most part, offered by the railroad companies without delay at reasonable prices to settlers, and quickly passed into individual ownership. If, however, at the time these grants were made, any portion of these lands was in the actual and lawful possession of individual owners, it did not, of course, pass to the railroad companies; and in the important Dunmire case the Supreme Court of the United States decided that where such tracts had once been entered upon and claimed by settlers, who had subsequently abandoned or relinquished them, the land grant companies were not entitled to them. As a result of this decision, a cloud was thrown upon the title to much property in the land grant states, and the work of the land lawyers was greatly increased, both before and after congress enacted a law giving validity to the title conferred by the companies upon genuine and bona fide purchasers.

There were some lands in the vicinity of Denver that belonged in the class that was not conveyed by congressional grant to the Union Pacific Railroad Company on account of having been previously subjected to individual appropriation, although they had been abandoned. Upon one of these lots of land, consisting of 160 acres, the southeast quarter of section 17, township 4 south of range 67 west of the Sixth principal meridian, Robert Steele made his filing according to the land laws and established his residence thereon with the required improvements. For the time fixed by the law this was his home, genuinely and in good faith, and, although he maintained his office and law business in Denver, he carried forward the improvement and cultivation of the ranch, gaining benefit to his health not only from the manual work he was able to perform, but also from the daily trips between the ranch and the town. At the time his ranch cabin was built, there was no building within a distance of a mile and a half, and the prairie sod was still unturned. In July, 1892, when the officials of the Denver land office were notified by the land commissioner at Washington that the homestead entry of Robert W. Steele had been finally approved for patent, this land was "conservatively estimated," according to a current newspaper article of that time, to be worth $100,000. It extends southward from the line of Exposition street to the line of Mississippi street and westward from Fairmount Cemetery, and seems destined to become a part of the fully occupied residence district of the city. Another tract of land, even nearer the city and even more valuable, was secured by one of Robert Steele's associates. Along the eastern side of the Steele ranch extends

Hyde Park avenue, another mark of his tracing, for he opened this roadway freely and without compulsion as a matter of convenience for his neighbors.

The members of the firm of Steele & Malone soon came to be regarded as experts in land law practice and their business increased rapidly. Many of the settlers upon the railroad grant lands required their services in clearing the cloud that had been cast upon their titles by the Dunmire decision, and this business necessitated frequent trips to the general land office at Washington. The esteem in which Attorney Steele was held at this time by men high in the federal government is indicated by the story told of a certain United States senator who introduced Robert Steele and a lawyer of another firm who was associated with him in a particular case to the land commissioner with these words: "Mr. Commissioner, whatever these young men tell you as a fact, you may depend upon as absolutely true." The advantage of such a recommendation from such a source in such a quarter is shown by the fact that in this case a patent was issued within thirty minutes of the time the final proof was presented. And the land office is popularly supposed to be one of the most leisurely branches of the government.

In the fall of 1890, Robert Steele was elected chairman of the Republican central committee of Arapahoe County. The frequent statements made by him to personal friends and political associates make it certain that he did not choose the path of politics as the open highway of wealth or personal advancement. For seven years he had taken no prominent part in political affairs and had devoted himself strictly to his home and his business. But he could not suppress either his interest in political questions or his liking for political activities. As early as 1884 he was involved in a small controversy regarding some statement said to have been made by Senator N. P. Hill concerning the appointment of a Colorado postmaster, but from the time of his retirement from the position of clerk of the county court his effort was to keep out of politics rather than to engage in such activity. In 1890, however, he yielded to the persuasion of his friends and assumed the leadership of his party for Arapahoe County. He was the acknowledged choice of the regular Republican county organization for chairman, but factional feeling in that year ran so high that there had been a bolting convention and a rival county chairman had been appointed. The first act of the campaign in the fall of 1891 was a letter addressed by Chairman Steele to Chairman Theodore H. Thomas, of what were known as the Turner Hall Republicans, proposing a compromise upon the basis of the disbanding of the Turner Hall organization, the holding of precinct primaries to choose delegates to the Republican county convention, the election at the primaries of an entire county central committee, and representation of the minority faction by judges at the primary polls. This proposition being approved as eminently fair, reasonable and conciliatory, it was promptly accepted by Chairman Thomas and was ratified in due course by the Turner Hall committee and by the Republican county committee at its meeting held September 19, 1891. Chairman Steele then stated the purpose of his proposition to the committee as follows:

> "It is not necessary for me to rehearse to you the differences which arose in the party last fall and which resulted disastrously to the party. For the purpose of harmonizing all the differences, and for the good of the party, your chairman two weeks ago addressed to the chairman of the opposition a letter in which he promised several things. He promised that precinct primaries be held in each precinct in the county; that at such primaries there be elected a member of the county central committee and that that committee be requested at its first meeting after such elections to select a chairman; they to serve the party for one year.
>
> "It was for the purpose of healing the differences in the party and in order that we might rebuke the opposition which has gained considerable power in the county through the existence of these differences. It was for the purpose of harmonizing the party before

> the coming of a national campaign in which it might be that Mr. Blaine should decide to be the candidate, and it might be the wish of the Republicans of this state that he receive their vote for the highest office in the gift of the Republican party."

The precinct primaries were held according to agreement on September 24, and resulted in the choice of delegates to the county convention who were unquestionably the selection of the Republicans of the county. The county convention was held on September 26, and Chairman Robert Steele opened its proceedings with these words:

> "Gentlemen of the Convention:
>
> "It has been the one endeavor of your county central committee to provide honest, fair and decent primaries in the precincts of this county. We believe that we have done so, and we believe that you came from Republican neighborhoods of this county to express the will of the Republicans in convention. If you nominate a good, clean ticket at this convention, there is no doubt about its election in November."

The name of Robert Steele had been mentioned on the eve of the convention as a possible candidate for the office of district attorney, but he was not the leading candidate. So general, however, was the approval of his success in restoring party harmony that, after he had been nominated by R. D. Thompson and his nomination had been seconded by W. H. Griffith, before the completion of the first ballot all opposition was withdrawn and he was chosen by acclamation.

So far in his political acts and opinions Robert Steele had been a Republican partisan. But it is interesting to note that in this, his first campaign for an elective office, the issues were not drawn upon strictly partisan lines. The wise, conciliatory and successful move toward party harmony, which won him the nomination, involved distinctly that principle of popular self-rule in politics and in government which was to play so important a part in the controversies of later years; so while he was the regular candidate of the regular party organization he was, to a degree unusual for that day, the popular candidate rather than the machine candidate.

In the campaign that followed his nomination he took an active part, making speeches in such remote country towns as Highlands, Harmon and Colfax, all now included within the city limits of Denver. He was regarded as the candidate of the "law and order" part of the community, while the Democratic candidate was attacked and defended as the candidate of the "liberal element"; thus injecting another non-partisan issue into the campaign. Additional evidence of the growing spirit of revolt against narrow partisanship was given, a few days after his nomination, by the Republican state platform, adopted at Glenwood Springs, which declared in its opening sentences: "While not agreeing with the president upon questions of the coinage of silver, we recognize his great ability and heartily endorse the administration as being pure, upright and honest."

In the election of that year the entire Republican ticket, headed by Hon. Joseph C. Helm for judge of the Supreme Court, was successful, and Robert W. Steele was elected district attorney by a majority that compared well with those given to other candidates upon his ticket and that was the more gratifying because of the unfair and unwarranted personal attack made upon him by some of the elements opposed to his election.

An interesting fact in connection with this election of 1891 is that it was the first at which the new Australian ballot was used according to the law passed by the legislature in 1889. Previous to that time the tickets of the several parties had been printed upon separate ballots, with opportunities for fraud in ballot-box stuffing and in counting that were successfully blocked by the Australian ballot.

The law of 1889 is justly regarded as the initial step in a long series of political reform legislation, which culminated with the adoption of the initiative and referendum and the recall by a vote of the people in the elections of 1910 and 1912.

For the next three years the time and effort of District Attorney Steele were devoted strictly and almost entirely to the public service. While his business partnership was continued on account of the extensive investments that had been undertaken by the firm, his idea of public duty would not permit him to continue the practice of his profession outside of his duties as public prosecutor, or even to give to his personal business that attention which it imperatively required.

As a result of the change in the law at the beginning of his term the cost of maintaining the district attorney's office was greatly reduced, and a large part of the receipts were turned back by him into the county treasury. His first annual report, which was filed with the secretary of state January 11, 1893, shows a balance turned over to the county treasurer of $2,719.27, and an even better showing was made in subsequent years. The professional showing was even better than the financial. In a review of his career as district attorney, published in the Denver *Times* upon the completion of his work in that office, it was stated:

> "Mr. Steele has made an excellent district attorney, and has filled the office with honesty, fidelity and ability. His assistants and deputies were wisely chosen. He was a prosecutor and not a persecutor."

The Denver *Republican* a few days earlier had declared:

> "As district attorney of the county during the past three years, and as clerk of the Probate Court from 1880 to 1884, Mr. Steele has made an official record in every way creditable to himself and beneficial to the public, and it may be accepted as a foregone con-

> clusion that he will win new laurels in the office of county and probate judge. He is honest, honorable, fit and industrious, and the *Republican* takes great pleasure in congratulating both him and the community upon his elevation to the bench."

Even the liberal element, so called, that had opposed Robert Steele's election as district attorney, readily admitted that they had no just cause of complaint. He gave them, as one of their number said, "a square deal." He was, as the *Times* expressed it, "a prosecutor and not a persecutor." He enforced the law, but he never made out of the law an instrument to serve any unworthy purpose, partisan or personal. No suspicion of graft or extortion was ever directed against the office of district attorney during his term, and the only serious charge ever brought against him was that he performed his official duties too well. In December, 1892, a newspaper article appeared, in which "a large number of attorneys" were quoted as expressing their indignation at the employment of professional jurors in criminal cases, and blaming District Attorney Steele for this condition. His answer to this accusation is too clever as a piece of controversial writing, and too interesting as a contribution to local history, to be omitted from these pages:

> "I am called to answer the charge that the jurors in attendance upon the West Side Criminal Court are professional jurors, and that 'it is almost impossible to secure the acquittal of a defendant in that court by reason of their bias or prejudice against criminals in general.'
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> "I wish to say that the district attorney does not want any professional jurors, that it is a notorious fact that the state always suffers from professional jurors, and it is always the desire of the prosecution to secure the very best men in the community to serve as jurors; and it is always the great and first purpose of criminal lawyers to excuse from juries the men who have property to be protected, and the men who are interested in the enforcement of law.
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> "The judges of the District Court will bear me out in the statement that the present panel of jurors is as good, and composed of as reputable citizens, as any ever impaneled in this county, and that since the law of 1891 went into effect the juries in the Criminal Court have been exceptionally good.

"On the present panel of about fifty jurors there are, as I am informed by the clerk, only four who have served on any jury since September, 1891, and the great majority of them have never before served on any jury in this county. On the jury by which Hugh Carlin was found guilty there was only one man who had before served on a jury, and the defendant having ten challenges, could have secured a jury composed of men who had not before this term served on any jury in this county.

"To say that the present panel of jurors in the Criminal Division of the District Court is composed of professional jurors is a gross misrepresentation, and is doing great injustice to the many gentlemen who are neglecting their business to serve on that jury.

"I am willing to concede the charge that it is almost impossible to secure the acquittal of a defendant in the District Court, but I do not attribute the conviction of defendants to the bias or prejudice of the jurors against crime, or because of any desire to secure the approval of the district attorney, but to the fact that the defendants, with very rare exceptions, are guilty, and the cases are tried almost immediately after the crimes are committed, while the proofs are fresh in the minds of the witnesses.

"While I am personally acquainted with but four or five of the present panel, I do not doubt that these jurors are prejudiced to a certain extent against criminals—all good citizens are prejudiced against criminals—and it is, and should be, the aim of a public prosecutor to secure a jury composed of men who are not in sympathy with criminals, and I know the present panel of jurors in the District Court is not in sympathy with crime or the criminal classes. * * *

"The public prosecutor must always expect to be abused by that class of criminal lawyers that grow up and are fostered and maintained in large cities. I do not mean lawyers who appear occasionally in the courts to defend criminals, but I mean that class to whom no client entrusts any civil business and who haunt the jails and the justices' courts to get business and who are willing to take desperate criminal cases upon contingent fees, with the hope of obtaining an acquittal or a mistrial by misrepresentation and pettifogging.

"These are the lawyers who are most aggrieved at the results that have been secured during the present term of court, and I am exceedingly gratified that I am not called upon to apologize for many acquittals and few convictions, and the public will, I know, be gratified that an honest and fearless jury in attendance on the District Court have acted upon the maxim of that great statesman and soldier, 'Let no guilty man escape.'"

It was while Robert Steele was engaged in a service to which he devoted his entire thought and effort that the state of Colorado was suddenly assailed by a financial and industrial tempest such as few communities have experienced. Up to the year 1893 Colorado was *par excellence* the "Silver State." It was not merely that silver was her principal product, nor even that this was the one thing she produced that had a fixed value and an open market at all times. The entire structure of business and industry in Colorado was built upon the foundation of silver, and an insecurity of that metal in its position as one of the two fundamental money standards of the world was a disturbance and a threat to every dollar of property, to every part of business and to every individual of the population of the state.

For various reasons—some industrial, some political, and many of them world-wide in their extent—the price of silver declined in seventeen months previous to June, 1893, from $1.00 to 83 cents. In that month the world was startled by the news that the mints of India, hitherto one of the principal outlets for the product of the silver mines, had been closed to further coinage of that metal. By June 30 the price of silver had declined to 62 cents an ounce. On June 29, at a meeting of the managers of the smelters and many of the larger mines of the state, it had been resolved to close down until conditions became better. On July 17 came a crash among the banks of Denver, the effects of which were not relieved until after all but three had suspended or failed. This disaster to the banks was but a single manifestation of almost universal wreck in business and financial circles. Employment ceased suddenly for thousands; material property of all kinds became practically valueless in exchange for ready cash; in hundreds of cases the savings of a lifetime were swept away in a moment; business men who had enjoyed and deserved the highest measure of credit were unable to meet their obligations, and the most promising investments shrunk in value until they were transformed into a crushing weight upon those that had assumed an obligation of future payments.

The investments of Steele & Malone were not exempt from the universal disaster. For two years Robert Steele had ceased his connection with the legal business of the firm, but he was still concerned in the land investments that had been made in the Arkansas Valley, in Denver and elsewhere. As a result of nearly ten years of hard work, coupled with much more than ordinary business sagacity and good judgment, and with opportunities of exceptional promise, he had gained what had seemed to be the assurance of a moderate fortune. Under any except most extraordinary conditions, these investments could not be considered speculative in their nature, for they were based upon an intimate knowledge of values and conditions, and they had already demonstrated the excellent judgment with which they had been planned and placed. Almost in a day, through no fault of his own, and almost without his knowledge, these accumulations and favorable prospects were swept out of existence, and in their place Robert Steele found himself under a load of obligations that taxed to the utmost his courage and his strength through the remaining years. Under similar circumstances, other men of undoubted honor and of unquestioned integrity have thought it no disgrace to evade the responsibility for such indebtedness. Robert Steele matched his life to a higher standard. In the dark days of 1893 he wrote for the relief of others a bankruptcy law that gained high repute for its mingled mercy and justice, but for himself he claimed no clemency. Men saw and respected the quality of his character and the integrity of his purpose and gladly accorded to him the one thing he asked—the time to meet their claims. Only those most intimately in his confidence knew the burden he carried through the years, or how much strength and time that might well have been devoted to better things went toward the discharge of that indebtedness. For nearly twenty years Robert Steele faced his task and performed his duty, and, when the end came, he went to the great hereafter a free man, having discharged not only every personal debt, but also every one that had been assumed by him as a result of business entanglement or association with other men.

Such a record is rare, and it deserves permanent inscription all the more in the case of one whose high achievements in other lines might possibly warrant popular indulgence toward personal carelessness in business affairs or a disregard of the highest standards of financial integrity.

CHAPTER V

THE TRIBUNAL OF THE PEOPLE

IN Colorado, as in other states whose court system is planned along similar lines, the County Court is, more than any other, the Court of the Common People. From the settlement of petty quarrels it is relieved by the justices' courts, and in the cities the police magistrates assume jurisdiction in cases involving infractions of municipal ordinances and the numerous matters belonging to the daily duties of the police. The district courts, on the other side, take the responsibility for all the more serious criminal offenses and for those civil cases where the larger rights and interests of corporations and wealthy individuals are concerned. The County Court is the court of the middle classes, and it is especially the court through which the state administers its duties and asserts its authority upon the common people. It is the court of the widow and the orphan. It deals with the administration of estates; it is charged with the protection of minor heirs; it grants the great majority of divorces; it has the duty of safeguarding the interests of individuals and of society in cases of insanity; and it was entrusted with the responsibility of dealing with juvenile offenders until the development of that portion of its work resulted in the establishment of a distinct court for that particular purpose.

In January, 1895, the position of judge of the County Court of Arapahoe County was about to become vacant as a result of the election of Judge O. E. LeFevre to the District bench, and the board of county commissioners appointed to the place Robert W. Steele, whose term of office as district attorney had not yet expired. He brought to this position the intelligence gained by his work as public prosecutor, his knowledge of the causes of crime, his conviction that the criminal is himself often the victim of circumstances and conditions over which he has no control, and his understanding that the suffering that is the inevitable result of wrongdoing must always fall far more heavily upon the innocent than upon the guilty.

To the superficial view, the work and duty of the county judge and those of the district attorney might seem to be diametrically opposed. The one is the representative of the terror of the law, the nemesis of the criminal; the other finds his duty in the most paternal branch of the government and represents society's rapidly enlarging conviction that the innocent ought not to suffer for the guilty, and that the strongest of human institutions, the State, has a duty to perform toward the weak and the unfortunate. There is no doubt that Robert Steele's experience as district attorney had an important part in his work as county judge, and there is no doubt that his work in the people's tribunal, the County Court, had a most important bearing upon his ideas, his opinions and his position in the higher court to which he was later called.

Robert Steele, it should be remembered, was truly a man of the people; not in the sense of being a representative of the lower classes of society, to whom demagogues sometimes seem to ascribe an exclusive right of citizenship, but in the sense that he was the outgrowth and product of a community in which the distinction of classes had not yet become established. In such a town as Denver was in the closing years of the nineteenth century there was no democracy as distinguished from aristocracy. Socially and politically Robert Steele acknowledged no one as his superior; he looked down upon no one as an inferior. His birth, his associations, his education, his early experiences in business, in politics, in public service and in the practice of his profession had made him as good as the best among his associates; but none of these things had developed in him any of that sense of self-assumed superiority which is too often inseparable from a successful career. If as the public prosecutor he had come to feel himself distinctly aligned with the forces of law and order and opposed to the disintegrating and reactionary elements of human society, his work as judge of the County Court very quickly brought him into touch and harmony with the spirit of the people, and gave to him an understanding of the needs, the limitations, the rights, the troubles, the temptations, the struggles, the sufferings, the aspirations and the ideals of the average man, of the average woman, of the child of the people, which was intensified and illuminated by his own experiences of financial reverses and of well planned ventures wrecked through no fault of his own.

It is not true that every judge of the County Court gains from his experiences what Judge Robert Steele obtained there. But it is true that his work as probate judge for the widows and orphans, his services in connection with divorces, naturalizations and commitments in insanity, his enforcement of the laws against the inhumane treatment of animals and children, and his care and consideration for the boys and girls that came under his authority in cases of juvenile delinquency had a most important part in the development of his mind and character, in preparing him for the high duties subsequently laid upon him, and in assuring to him that place in the confidence and the affection of the people of the city and the state which it was his good fortune never to lose.

While events in Robert Steele's professional career were thus shaping themselves in such a way as to make him independent of class interests and to qualify him for service as the judge of all the people, other events along political lines were combining to rid him of the bonds of narrow partisanship and to make him particularly the representative, and in a measure the precursor of a new era of political thought and practice.

When Davis H. Waite was nominated for governor of Colorado by the Populist party in 1892, the possibility of his success was as far from the thought of anyone, even among his own supporters, as is the expectation of the election of Eugene V. Debs as president from the minds of those who regularly present him as a candidate for that high office. But Waite represented opposition to things as they were, and the progress of political events in connection with silver and other current issues suddenly drew to his support thousands of men whose sole impulse was to strike blindly against forces that were crushing them. His election as governor in that year is but another proof of the severity of the tempest that was disturbing the foundations of all the establishments of society, business, politics and government.

Waite represented more than opposition. Fanatic, bigoted, impractical as he was, he had distinguished, in common with others of his class in that day, some of the elements of social and political evil; he had sought earnestly for the solution of pressing problems; he had found a beginning of the way of progress upon which the men of today walk in the full light of a new era. He realized that the very foundations of popular self-government were endangered by the development of special privilege and by a rapidly growing interference, in politics and government, with that rule according to the will of the majority of the people, which is the vital essence of the American republic. Declaring in Scriptural quotation that it were better that blood should flow to the horses' bridles than that the fundamental principles of this government should be overthrown, Davis H. Waite found himself the opportune target for a shower of misrepresentation, cheap witticisms and contumely which persisted throughout his life and from which his memory has never been cleared. The failure of his administration, with its successions of disorders, turmoils and incompetencies, brought the Republican restoration of Governor McIntire, who was loudly heralded as the "redeemer" of the state from Populist misrule and folly, but whose administration, outside of its demonstration of his unfitness for that high position, only served to fix more firmly in the minds of the people the unreasonableness and the dangers of the machine system by which the Republican organization was dominated and directed.

Governor McIntire was inaugurated in the same month (January, 1895) in which Robert Steele was appointed as county judge. In that month also Edward O. Wolcott, for the last time, was commissioned by the people of Colorado to sit as their representative in the senate of the United States. The senior senator at that time was Henry M. Teller, who among all of Colorado's public men reached the highest position in the regard of his fellow citizens and in honor among the statesmen of the nation. Originally a Democrat, he had joined the Republican party very early in its history, and from 1876, when the state of Colorado was created, he held the position of United States senator until 1903, except for the three years from 1882 to 1885, when he was secretary of the interior under President Arthur. A man of unblemished personal character, of high intelligence, and possessing the confidence and approval of the people of his state to an extraordinary degree, Senator Teller was a true and worthy representative of Colorado in the high council of the nation. At an early stage in the development of the silver controversy, he recognized its importance to the nation and to his state and gave to its consideration such a thorough study as perhaps no other man of his times was able or willing to give.

The rehabilitation of Colorado industry, progressively accomplished since the dark days of 1893, brought no change in the opinions of the people of the state with regard to the rights and the importance of the silver question, which was easily the central and paramount political issue, so far as Colorado people were concerned, of the presidential campaign of 1896. The election of McIntire as governor in 1894 and the election of Wolcott to the senate in January, 1895, were victories for the Republican machine, while Teller and the delegates who accompanied him to the St. Louis convention in June, 1896, were unquestionably the choice of the great majority of the Republican voters of the state. Senator Teller, with three other western senators, walked out of the St. Louis convention in protest against the adoption of a gold plank for the national party platform, and the news of his action was heralded to the people of Denver by a salute of twenty-one guns on the state capitol grounds.

The relations between Senator Teller and Robert Steele had been especially friendly and intimate. The successful statesman had taken a genuine liking for the youth who was winning for himself such a large number of friends among all kinds and conditions of men. Long before the silver question came into national prominence, Robert Steele had entertained the highest respect and admiration for Senator Teller, and had often sought and received his counsel and advice in political and personal affairs, in conversation and by correspondence. In the partings of the political ways Robert Steele, like thousands of other Colorado Republicans, went with Teller, but he took this course not merely because he was satisfied to follow the political fortunes of the man for whom he had the highest regard and respect, and not solely because he saw the importance of the silver issue to the welfare of his home state. Robert Steele was an independent thinker, and his own study and his own intelligence had brought to him the conviction that the silver problem involved fundamental principles affecting the rights and the interest of the common people. He became convinced that in sober truth a moral issue, as well as a financial issue, was raised by a proposition to change the basic standard by which was determined not merely the exchange value of all kinds of property, but the earning power of labor, and the measure according to which all outstanding debts were to be repaid. Believing as he did, it was impossible for a conscientious thinker like Robert Steele to call himself a Republican so long as the Republican party plainly declared itself opposed to the maintenance of the monetary system that had been the established practice since the earliest days of the republic. The Silver Republican party was the necessary and logical result, not of Teller's bolt, which was merely incidental, but of the adoption by the Republican party of a new test of party loyalty.

It was as a Republican that Robert Steele had been appointed to the county bench by the commissioners. It was as a Republican that the party convention, September 26, 1895, had given him by acclamation the nomination both for the short and the long terms. It was as a Republican that the people in the following November had approved the choice of the commissioners and the selection of the party convention; at the same time setting their seal of approval upon his course of public conduct thus far. But the election of Adams as governor in 1896, and the re-election of Teller as senator in January, 1897, marked a great and permanent change in political conditions. In

1898, Judge Steele was again a candidate for re-election, primarily as a Silver Republican, but with the endorsement of the People's, the Democratic, the Teller Silver Republican and the National People's parties, and he received almost exactly two-thirds of the total number of votes cast at that election.

In those years of political confusion party names were still strong with large masses of voters, partisan banners were waved as wildly as ever before, and partisan bosses still plotted in the old way and held firmly to the belief, often frankly expressed, that machine methods of chicanery and usurpation were necessary for the conduct of public affairs. Looking back over those years, with the knowledge of what has developed since, it is easy to see that they were years of partisan disorganization. The old issues growing out of the attempted secession of the slave-holding states and the reconstruction of the Union were no longer dominant upon the political purposes and aspirations of the masses of American voters. New issues were beginning to rise amid the fragments of outgrown forms. The period of reorganization had not yet arrived, and it would have required the vision of a prophet rather than that of a statesman to have foretold along what lines the political development of the future would run. The vote of the senatorial election of 1895, when Wolcott, Republican, received 57, Pence, Democrat-Populist, 36, and Thomas, the National Democrat, 3, gives proof that the change then going on was something far wider and more fundamental than a change from one party to its opponent, a simple transfer of the commission of public authority from one established organization to another party, constructed upon similar lines, working with similar methods, and devoted to a policy that consisted mainly in taking the opposite view of the things that were occupying the attention of its political rival. The succession of Democratic governors—Adams in 1896, Thomas in 1898 and Orman in 1900—definitely marked the rejection of the old political faith and methods to which the people of Colorado had almost continuously pledged their allegiance in former years, but the beginnings of the new life of the future, the developing form of the politics of the twentieth century is not to be found among the champions or the "wheel horses" of either of the old party organizations, but with Teller and Steele and unnumbered others from both parties who thus early broke the customary bonds of political conservatism and set for themselves the higher standard of the people's welfare as the supreme authority for their political conduct.

How closely Judge Steele kept himself to the domestic affairs of the common people, how earnestly he devoted himself to the faithful performance of the duties of the office that had been committed to him, how successfully he planned and wrought and withstood, as the agent of state authority for the benefit of those that came within the circle of his power and influence, is told in the volumes of the proceedings of the court of Arapahoe County for the years 1895 to 1900. From that amount of material it is possible to select for present use only such instances as may serve to show the scope, the character and the purpose of the work that he was doing.

The divorce business of the County Court was a large part of its routine work. The comparative laxity of Colorado divorce laws, in spite of legislative efforts at reform, had been further increased by the practices of the courts. It was for the legislature and not for the judge to make the laws, but it was clearly the duty of the judge to see that the laws were executed and administered correctly. In a single day Judge Steele dismissed three juries, discharging them after they were impanelled and the cases begun, because formalities prescribed by law had not been complied with, or because a proper preparation and presentation of evidence had not been made. In another case, where the testimony of the applicant for divorce did not appear to be satisfactory, Judge Steele took matters into his own hands, personally questioned the witness, and refused to proceed with the case until certain matters that seemed mysterious had been explained and cleared up to his satisfaction. Such incidents are not important in themselves, but they indicate that Judge Steele took his work seriously, that he considered himself to be a responsible agent in the administration of justice and not merely the attendant of a divorce mill.

The county judge has the authority to bind as well as to loose, and the office of marrying was not without some surprising incidents. In one particular case, after the ceremony had been performed the judge accidentally discovered that the bridegroom was under the legal age, and that the marriage license had been issued through the neglect of a clerk who had omitted to ask the prescribed questions. Thereupon the wedded pair were officially notified that the completed ceremony was null and void. The following day, however, the eighteen-year-old bridegroom returned with two witnesses to prove that he was self-supporting and that his parents were non-residents of the state, whereupon the judicial sternness was mollified and the ceremony was allowed to stand as of good record and effect.

In another case the matrimonial candidates appeared in court while a divorce case was being heard. It was with characteristic kindliness that he interrupted his business to comply with their request, and the incident became further illustrative of his personal interest in the welfare of all around him when he took advantage of the opportunity to give them a simple, kindly talk upon the pitfalls and safeguards of married life, calling their attention to the wreck of happiness that had been so incongruously presented to their view at that particular time.

An interesting fact in this connection is that Judge Steele never accepted a fee for his service in the marriage ceremony, but conferred the state's recognition of the mating of man and woman, as a privilege of citizenship, without a charge.

The work of naturalization also came under the authority of the County Court. Like the divorce laws, the naturalization laws of that time were very lax. A great many persons were naturalized in almost every state as a part of the regular methods of machine politics, and too often very little effort was made to require any proof of fitness for citizenship, or any genuine compliance with the very liberal provisions of the law. Judge Steele was one of the earlier judges to insist upon some demonstration of the applicant's understanding of the duties of citizenship, although his efforts to uphold the standard were not always successful, as witness the case of "Joe" Shiwagri, a Syrian, who, after five years of residence in this country, knew but a single word of English, his own abbreviated first name, and who could neither read nor write. Judge Steele refused naturalization, but "Joe" promptly renewed his application before a judge of the District Court and became, as the newspaper account of the day has it, "a full-fledged member of the voting contingent for use at the next election."

The responsibility of the state toward the insane, involving, as it often does, the enforced restraint of the patient and his separation from friends and home, is especially trying to public officials and others connected with this part of governmental duty. Conscientious and sympathetic in his nature as Judge Steele was, the testing of persons suspected of insanity, and the care of the interests of those who were incompetent to care for their own, made unusual demands upon his strength, which were never slighted or refused. The difficulties and the thanklessness of such duties are well illustrated by the once famous Daily case. Daily had been sent to jail by Judge Steele for contempt of court in refusing to pay alimony to his divorced wife, but he had been released when it became evident that he was unable to make the payments and that no good would result from his continued imprisonment. Mrs. Daily became possessed with the idea that Judge Steele was her personal enemy, and, after several months of letter writing, personal visits and other forms of annoyance to him and to members of his family, her delusions culminated at two o'clock one April morning in 1899, when she threw two large stones and a heavy bottle through three large windows of Judge Steele's residence. The missiles were accompanied with signed notes and newspaper clippings referring to her fancied wrongs and grievances. When Mrs. Daily was tried upon a charge of insanity, Judge Steele had Judge Jacobs come from Greeley in order that there might be no doubt about the fairness of the hearing. She was sent to the state asylum at Pueblo, from which she twice escaped, but was soon recaptured. Even after she was released in the care of friends from another state, her unreasoning enmity toward those who had never injured her in any way was a continued source of apprehension for the objects of her hate.

Another case, which involved the rights of the mentally incompetent as well as those of the widow, was that of Dr. Henry Bucknum, who had a five-thousand-dollar life insurance policy issued by a certain company. Dr. Bucknum went insane and died in the Pueblo asylum. At the time of his death the original policy had been replaced by one for $2,000, which the company refused to pay, claiming that, at the time the application was made for the second policy, Dr. Bucknum was not in sound health as stated in the paper he signed, but was insane. Suit having been brought, Judge Steele decided that the widow was entitled not merely to the $2,000 for which she sued and for which he gave judgment, but for the entire amount, $5,000, of the original policy, inasmuch as the doctor as an insane person could not legally make a substitution of his policy or a waiver of his own rights or those of the beneficiary.

In the conduct of the probate business of his court, Judge Steele showed himself a vigilant protector of those whose interests came under his authority, a clear-sighted dispenser of justice in the intricate settlements of estates under will or the general statute, and a very active and stern foe of everyone, whether attorney, official or claimant, who sought to gain an unfair advantage over others. Himself a man of the most scrupulous integrity, it was sometimes difficult for him to understand how men in positions of trust and honor could allow themselves to be controlled by dishonest or selfish motives. His always active sympathy for the weak and the unfortunate made him the more uncompromising in his resistance to all forms of injustice and oppression, but the broad tolerance of his humanity extended even to those against whom his indignation was righteously aroused. He was just even to the wrongdoer.

In the famous case of the estate of Isaac Cooper, the report of the administrator showed that five years after Cooper's death the estate that was originally estimated to amount to $100,000 or more had decreased to a balance of $972.95. Judge Steele's attention having been called to the matter, he appointed a referee to investigate the affairs of the estate and summed up the referee's report with the declaration that, while he believed that the administrator had not been dishonest, no estate before his court had ever been wronged like that of Isaac Cooper:

> "Twenty-four thousand dollars paid to a portion of the fourth-class claimants and bonds taken many of which are worthless and the principals and sureties beyond the jurisdiction of the court; twenty-five thousand dollars paid to attorneys and the estate not near settlement; sixty thousand dollars paid out of the funds of the estate upon orders of the judge"—a former judge of the County Court—"and no records of these expenditures; seven thousand dollars loaned to the judge; thirty-five hundred dollars mysteriously disappearing for a space of two years and as mysteriously reappearing among the moneys of the estate but without interest."

Judge Steele further said:

> "A judge who receives favors in the way of a loan and who of his own motion appropriates the money of an estate to his own use, as was shown by the testimony in this case, cannot be expected to scrutinize and impartially pass on the reports of the administrator; his judgment is warped; the consciousness of the wrong he has committed precludes right action; with him the paramount issue is protection, and having become a wrongdoer, he closes his eyes to the plundering of others."

In conclusion, Judge Steele fixed what he considered to be proper compensation for the attorneys, ordered the administrator to amend his report so as to show a balance of $6,424.38, accepted his resignation and ordered the papers of the case turned over to the clerk of the court.

The Tritch will case, involving the disposition of an estate valued at more than a million dollars, was another matter that attracted more than usual attention at the time of its decision. Judge Steele refused to admit the will to probate, mainly because it was eccentric and capricious, and further because it involved apparently an unjust and unreasonable discrimination among the heirs. Judge Steele's decision in the Tritch case is a good illustration of the careful attention he gave to such matters, and of his clear vision of justice as well as his comprehensive grasp of the legal principles involved in his judgments.

The case of the estate of Ezra M. Bell was another matter of general public interest. In this case it was the widow who was insane, and Bell, by instruments of will and deed, had placed his estate in the hands of trustees for the benefit of Trinity Church, with the provision that all of the income, or so much of it as should be necessary, should be applied to Mrs. Bell's comfortable support. Application was made to the court in the name of Mrs. Bell to allow her conservator to take half of the estate under the statute instead of continuing the arrangement by which she was receiving her maintenance from the trustees. In deciding the case, Judge Steele said:

> "I have concluded it is for the best interests of the ward that the trustees retain the estate. Under the provisions of the will she is entitled to support and maintenance even to the entire income of the estate. She needs nothing else. If she had other property, she would be unable to manage it because she is incurably insane. Even if she had an estate in her own name, she would be unable to dispose of it at her death, for an insane person cannot make a will. Her brothers and sisters are not to be considered in this matter. It appears that Mr. Bell wished to furnish his wife with an income from the estate during her life and that it was his expressed wish that none of his or her relatives should obtain any of the estate. By virtue of the deed there is a possibility at least that if she accepts under the statute, she will get no part of the income from the real estate. The personal property has been used up. So she might lose her entire estate. Therefore I rescind the order heretofore made allowing the conservator to elect under the statute."

Even the domestic animals came within the scope of the benevolence and humanity of Judge Steele's court. He sentenced to six months in the county jail one Christopher Mack, for "unlawfully, wantonly, willfully and maliciously," and, furthermore, drunkenly, beating a horse to death, refusing to allow him to escape imprisonment by paying for the horse, but telling him that he would have to compensate its owner, in installments, after his release from jail. In later years, after Judge Steele had risen to a higher position, he took a prominent part in the campaign against the barbarous and inhumane practice of docking horses' tails, and was largely instrumental in securing the adoption of the law that has stamped out that folly in this state.

One Saturday afternoon in March, 1900, an unusual scene was presented in the County Court. Eleven boys and one girl between the ages of eleven and sixteen were on trial, charged with various offenses. Eight were accused of truancy from school attendance, one of theft, one of assault and battery, one of stabbing another boy with a knife, and the girl of being incorrigible. So far as the mere presence of these juvenile delinquents—they called them frankly criminals in those days—was concerned, there was nothing unusual in the occurrence. Such compulsory attendance in the minor courts of justice had been customary during the judicial service of Judge Steele; boys and girls had faced their accusers and their judges in many lands and for hundreds of years before there was any attempt to discriminate between such youthful offenders and the older and more hardened criminals. But upon this eleventh day of March, 1900, a new experiment in justice was being tried. It was what Judge Steele had designated as his "Juvenile Field Day," and he made the announcement that he proposed to continue the practice during his term of office, or until all the children of the county should go to school regularly and cease from offenses against the peace and dignity of the state of Colorado.

Relatives, teachers and friends of the culprits crowded the courtroom, their interest in the individuals mingled with a lively curiosity to learn what new form of justice was to be dispensed that day. A deputy district attorney was still there to represent the power and majesty of the great state of Colorado, and a truant officer was there as a sort of inferior constable and witness. ("I am the truant officer; God help me!" he said in an undertone to a bystander.)

But from the beginning it was evident that a new role had been created in the judicial system, and the presiding judge became the children's mediator and friend. He was there not to punish, but to help; not to condemn beyond redemption for past offenses, but to remove obstacles, to point out error and folly and to open the way toward honorable and useful citizenship. As yet the machinery of the law was lacking for the full accomplishment of such a purpose, but Judge Steele did the best he could with the means at hand. Fred, who was charged with absence from school, vagrancy and theft, came into court with two loaves of bread and seven boiled potatoes in his blouse, and was sent to the reform school. Roy, without home and without friends, who had not been at school for a long, long time, was sentenced to the same refuge. Clement's case was that of evil associations and incorrigibility, and his parents agreed that there was no other course open than to send him to the reform school; but the mother fainted in court when the sentence was pronounced. Louis, who was accused of cutting another boy, received the usual sentence, which was suspended because he was defending himself from attack. Eddie, abandoned by his parents, wanted to go to the reform school so that he could get an education, and his case was taken under advisement, with the result that he was sent to a farm where he could learn to work and study. Henry, Albert, John and Russell were all convicted and formally sentenced to the reform school, upon which they burst into tears and wished they had been good, thereby arousing the smiling contempt of some of the more hardened criminals present. Judge Steele then talked with each of the four boys, and, having secured promises that they would attend school regularly, he suspended their sentences. A second Eddie, and Freddie, also received the suspended sentence treatment, and Edna, a negro girl, was sentenced to the state home.

A personal interest on the part of the judge in each of the offenders, a personal inquiry by conversation with each one in order to ascertain the causes and the conditions of the development of criminal traits and acts, an individual application of the legal prescription to each case, and a suspension of legal punishment under promise of good behavior for such as seemed to merit such consideration, were the features of Judge Steele's Juvenile Field Day, and these have been the principles according to which has been established the structure of the juvenile courts of a later day.

Of course, that was not the beginning of Judge Steele's interest in youthful truants and criminals. Long before the Juvenile Field Day had been inaugurated, one morning a boy of eight, and small for his years, was brought into the court, to determine the question of his custody between his legal guardian and an aunt whom the boy had learned to love. Witnesses had been heard, the learned lawyers had made their pleas, and the judge had given his decision according to the law and the facts presented. But the case was not ended. Force would be necessary to take the crying, clinging child from his aunt. Then the judge called the little fellow close to him and they whispered to each other for a moment, and the former decision was reversed.

Nor was the Juvenile Field Day, which Judge Steele established, the end of the movement for the redemption of erring and unfortunate children. Judge Steele's successor on the county bench was Judge Ben B. Lindsey, who gained a world-wide reputation as the judge of a court established exclusively for juvenile offenders. Judge Lindsey himself freely and frankly acknowledged the value and importance of Judge Steele's services in this great work of reform. In 1908 Judge Lindsey wrote to Justice Steele, of the Supreme Court: "I wish, if you could, you would write the opinion in the contributory delinquent case that is now before you. It seems to me that your experience and training in the County Court and knowledge of the chancery powers in protecting the material and physical welfare of the child in that court and disposition to apply those principles to protecting its moral welfare, make you more eminently fit to expound this doctrine than any of the other judges. Again, I have a little sentiment in the matter. You were the first judge to enforce our law of 1899 which contained the germ of the present Juvenile Laws, and in referring to the matter I want to refer to the decision by you." And no one gave more hearty recognition to Judge Lindsey's splendid work in developing the Juvenile Court than was bestowed by Judge Steele upon the younger man who had begun his career of success and fame in the law offices of Steele & Malone. Not Judge Lindsey alone, but other county judges also, in Colorado Springs, in Pueblo and in other Colorado cities, helped to make Colorado a conspicuous leader in the work of seeing and doing the state's duty toward the bad boys and girls, and toward those that were only in danger of becoming bad. And other noble men and women in all the states contributed their thought and effort in establishing a reform that is now almost universally accepted through the civilized world.

CHAPTER VI

UNOFFICIAL OPINIONS AND ACTIVITIES

OUTSIDE the employment of his official positions, as a citizen and as a man Robert Steele was always actively interested in whatever cause was for the welfare of the city or the state, and he was always ready when called upon for service that would be a benefit to someone that needed his help. One of the letters of which a copy remains he wrote to Mayor Van Horn, while he was district attorney, in the calamitous year of 1893, urging the maintenance of abundant street lights as a means of preventing highway robberies, and expressing the belief that economy might better be secured elsewhere. When the disastrous Iroquois Theater fire occurred in Chicago, Judge Steele promptly took steps to secure the safety of Denver theatergoers and enforced a rearrangement of seats and exits in one of the larger theaters of the city.

Robert Steele's retentive memory and his acquaintance with general literature was well illustrated upon one occasion, when he was still a law student, when he attended a public meeting, at which the speaker began the quotation:

> "As some tall cliff"——

and was unable to continue, the following words having eluded his memory. Judge Steele, who was seated near the speaker, promptly relieved his embarrassment by supplying the words,

> ——"that lifts its awful form
> Swells from the vale and midway leaves the storm."

and received the cordial thanks of the forgetful orator.

When the anti-toxin treatment for diphtheria was discovered, it was Judge Steele's contribution of $100 that brought the first portion of the new remedy to Denver, for use at the city hall by Health Commissioner Munn.

* * *

He liked to travel, as is the case with most men, and the story of the years should include at least a reference to a trip to California and another to Cuba, while visits to the eastern states, for business or pleasure, were too frequent for detailed mention. In connection with one such early trip the story is told by a friend and frequent companion:*

"We were about to start to New York City together. The judge asked whether I had any choice of route and I told him I had none. He said that, if he were going alone, he would go by the Santa Fe (which takes six or seven hours longer between Denver and Chicago than some other routes), and after some discussion I found that he patronized the Santa Fe whenever he could because in former days, when he was in business and before he held a public position, he had some business dealings with that company. We went to the Santa Fe offices to get our tickets. The agent of the company insisted upon giving him a pass, which he refused, because after he was elected to the bench he never rode on a pass, although it was the common practice for anyone with any influence whatever to ride on a pass in those days. He would not take the pass, but his sentiment for the road was there. He would take six or seven hours longer to patronize a railroad with whose officials he had had friendly business relations in long gone years. Frequently he acted because of a sentiment for something in the past, and I could tell of many instances where, in the little, everyday affairs of life, Judge Steele stepped out of his way to respond to a feeling of sentiment for old times, or old places or old friends. But, you may ask, did not this unfit him for acting in an impartial way in the larger affairs of life? No, not in the larger nor in the smaller affairs of life. The larger affairs are just made up of the smaller affairs. True sentiment does not do wrong. True sentiment is just the great heart of humanity, and he who truly follows it will not go wrong."

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*Mr. Guy Leroy Stevick.

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That Robert Steele's patriotism was not merely an empty profession was demonstrated at the time of the war with Spain, when he was County judge. He bought a manual of military tactics and began to study it in preparation for service as a soldier. "I am going to the war if my country needs me," he quietly said to a friend, but made no public or general announcement of his purpose. A short time later he offered his services to Governor Adams, who assured him that, under the conditions then existing, his services were more needed in the County courtroom than in the concentration camps of the volunteers, but gave the requested promise that if the need arose Robert Steele should have his place in the ranks of the soldiers of liberty and the nation's defenders.

While judge of the Supreme Court, Robert Steele was much interested in the law library of the capitol, and he helped in various ways to make that library more convenient and useful to lawyers and the general public. Among other things, he procured the binding, in convenient form, of a large number of pamphlets, which were previously unavailable for use on account of lack of arrangement.

Another matter in which he was much interested in this period was the constitution of the new state of Oklahoma. The constitutional cases brought before Justice Steele and his associates had impressed him with the dangerous possibilities of misinterpretation and usurpation. The makers of the Oklahoma constitution were fully awake to these dangers, and some of the prominent members of the convention in that state were in consultation with Judge Steele regarding the unique features of that constitution which received such severe criticism, but which ought to be read, in part at least, in the light of Colorado experiences and of the decisions of the Colorado Supreme Court, which were fresh at the time of its adoption.

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That Robert Steele might have taken high rank as a public speaker is the universal belief of those who knew him well. From his high school days he had the ability both to construct and to deliver his opinions upon matters of public interest in pleasing and impressive form and manner. He was much in demand as a public speaker, and it was only as a result of his own avoidance of prominence and publicity that he was not almost constantly engaged as a political and social orator. As a matter of fact, he rarely appeared as a speaker on public occasions, and the subjects that commanded his support in this way give good proof of the matters in which he was most interested.

On January 9, 1899, a "Jackson dinner" was held, which was especially interesting as a celebration of the recently consummated fusion of the Democrats, Silver Republicans and Populists of Colorado. Judge Steele, who had been re-elected as County judge in the preceding November on the fusion ticket, was one of the speakers and said in part:

"Silver Republicans are willing to join with you in celebration of this great day. They recognize in Jackson a peerless leader and advocate of the people against combined wealth, whose crowning act was to throttle a giant corporation, the like of which has not been seen in the country until trusts and monopolies were fostered by the infamous financial policy of the party now in power. * * * The Democratic party was born again at Chicago in 1896, and, with the aid of the People's party and the Silver Republican party, cast more votes for its candidate than were cast for all the candidates at any election prior to 1876.

"I believe there is a unity of purpose on the part of the Democratic, the People's and the Silver Republican parties and that purpose is to restore silver to its place as a money metal. The monied interests will, by strategy and insidious wiles, attempt to foist other issues upon us. They will not succeed, and the triple fusion has, I believe, come to stay.

"Jackson said:

> "'It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purposes. Distinctions in society will always exist under every just government. Equality of talents, of education or of wealth cannot be produced by human institutions. In the full enjoyment of the gifts of Heaven and the fruits of superior industry, economy and virtue, every man is equally entitled to protection by law; but when the laws undertake to add to these natural and just advantages artificial distinctions, to grant titles, gratuities and exclusive privileges, to make the rich richer and the potent more powerful, the humble members of society—the farmers, mechanics and laborers—who have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of their government. There are no necessary evils in government. Its evils exist only in its abuses. If it would confine itself to equal protection, and, as Heaven does its rain, shower its favors alike on the high and the low, the rich and the poor, it would be an unqualified blessing.'

"To these ideas we fully subscribe. We will unite with you in the essential issues, namely, the free coinage of silver and the destruction of the trusts. We believe the surest method of preventing the combinations of wealth is to coin silver at the ratio of 16 to 1.

"We will not differ with you concerning less important matters. We will ignore the differences now besetting you, and will draw the veil of charity over Democracy of the past, and will hail, as the coming of the dawn, the new Democracy—the triple fusion—which will restore to us the money of the constitution and make us prosperous and happy.

"May God bless and prosper our people under the administration of Charles S. Thomas as they have been blessed and prospered under the administration of Alva Adams."

* * *

On January 31, 1907, there was held, under the initiative of Governor Henry A. Buchtel, what was appropriately named a Good-Fellowship dinner, with the expressed purpose of harmonizing conflicting interests, reconciling hostilities, and forwarding united efforts for the common good. One of the speakers was Justice Steele of the Supreme Court, who said:

"We are here in the cause of upbuilding the state and improving the condition of our people. Upon this subject none need be for a party, all may be for the state, and we can be as the Romans were in the good days of old.

"Realizing that many flowers of friendship never bloom simply because men do not know each other, our host has designed these Good-Fellowship dinners, that all who stand up for Colorado may greet each other as friends. While we are feasting ourselves, let me recall to your minds some of the achievements of those sturdy characters who braved the terrors of the wilderness and struggled with the wild beasts and wild men to found at the base of these mountains a city that is destined to become one of the great cities of the nation, and to establish a commonwealth that should become the brightest jewel in the diadem of states. They were venturesome, patriotic and restless, and organized here, without the semblance of authority from the nation, the territory of Jefferson; elected a full set of officers, organized a legislature, and passed and published laws for its government—an action altogether unique in the history of the country. Their efforts to maintain an independent government were romantic, but not unpatriotic; and when the federal government organized the territory of Colorado, the officers of the territory of Jefferson gracefully gave way, and commanded recognition of the new officers appointed by the federal government. When we remember that many here were in sympathy with the South, that others were in favor of establishing an independent empire west of the Missouri, and that the government could not, for some time at least, have compelled submission to its authority, the action of the officers of the territory of Jefferson may have changed the course of this section, and we should revere them and honor them for what they did.

"The people were most constant in their demands for statehood, and, responsive to that demand, congress, in 1864, passed an enabling act, and finally, in 1865, the people ratified a constitution. John Evans and Jerome B. Chaffee were elected senators of the United States, and proceeded to Washington, expecting to take their seats in the senate, but they were informed that they would be admitted to the senate upon condition (and I have it from one of the actors) that they would support the president and his policy. This they declined doing, and the president promptly vetoed the bill for the admission of Colorado. This action delayed statehood for ten years, but not to our detriment. Had these men surrendered principle for an office, our progress would have been retarded for many years, and we owe them a debt of gratitude.

"The promoters of the Kansas-Pacific Railroad demanded of the people here a tribute in the way of bounty amounting to a large percentage of the assessed valuation of all the property of this county, and threatened to cross the mountains away to the south, skirting our southern boundary, unless bonds were voted to aid in the building of the road to Denver. The proposition was declined, and Governor Evans, whose son projected our Northwestern

The Steele Memorial Hospital, Denver, Colo.

Railroad, projected and financed, with the enthusiastic support of the people, the Denver Pacific Railroad, connecting Denver with the Union Pacific at Cheyenne, thus compelling the Kansas Pacific to build into Denver, settling and permanently fixing not only Denver but Colorado as a railroad center.

"These epochs I have mentioned are but a few of those of our early history that are worthy of consideration. I have mentioned them because they seem to be decisive points in the career of our people, and show the loyalty, the enterprise, the courage—the character, in fact—of those who laid for us a substantial foundation upon which we are building a permanent superstructure that shall remain until time unveils eternity. We can never pay the debt we owe to these sterling characters who thus builded for us.

"When silver slumped, when the banks failed, when mines closed, when values vanished, when debts doubled, we were all in distress; but we have passed through that period and now we are on another basis. True that creditors have the debtors' property, but on the whole we were benefited by the adversity. Let us not have another such boom; it does not pay. That boom lowered the moral standard and injured our reputation as a state. The more buyers there were for lots in North Denver, Weld County, the less there are to buy at fair prices in Denver proper. The more there were who bought lots on Green Mountain, thinking they were buying in Denver, the less there are now to buy on Capitol Hill. We are favored as few states are, in the very infancy of our development, with many millions of acres of irrigable land, soon to be made productive through the use of water from storage reservoirs. With untouched coal fields, with undeveloped veins of precious mineral, our future greatness is beyond calculation, but our climate is our greatest asset. Our almost eternal sunshine revives our spirits and preserves our health; it induces open-air recreation; it kills the germs of disease; it affords labor the healthful outdoor employment; it sweetens the beet; it brightens the bloom upon the peach; it colors the apple; it flavors the melon; it grants a profusion of wild flowers; it matures the grass and grain without decay. This sunshine, showering its manifold blessings, charms us, and makes us long to return to it and our favored land.

"The opportunities for acquiring wealth were never better than now. All business and enterprises have a fair field, and capital invested is assured an abundant return; but we shall be poor, indeed, if in the acquirement of wealth we neglect the essentials of good citizenship. Wealth is not an essential of good citizenship, nor can it alone make a state; but we must have men who know their rights and have the courage to maintain them. A mind solely bent on acquiring wealth accustoms the conscience to become pliable to the touch of every interest, and looks with complacence and indifference upon the inroads made by the wicked and designing upon the liberty of the citizen. You have lately heard of the proposition, publicly made, to have the constitution construed to meet the changed conditions, and it is said with confidence that such will be done when the occasion requires. Mr. Justice Brewer said but a few months ago:

> "'Never let the courts attempt to change laws or constitution to meet what they think present conditions require. When they do this, they clearly usurp powers belonging to the legislature and the people. The most glorious product of our civilization is not the entrancing beauty of the capitol, its marvelous manufacturing, mining and other industries, but rather the individual's possession of an independent, conscientious, public-spirited citizenship. Whatever may be the changes of the future, whatever the new conditions of social, business or political life, the time will never come when anything will justify shackling the Golden Rule or striking down the Declaration of Independence.'

"While we are enjoying this period of prosperity, this dangerous age of commercialism, let us not forget the lessons of the past nor our duty to our children. We should have constantly before us the thought that our fathers transmitted to us civil and religious liberty, to be sacredly maintained to transmit to our children and our children's children forevermore. If through our indifference or inattention these gifts of liberty, or any of them, are taken away from even the most wicked of us, we cannot transmit them to our children, and we shall be known to history as a recreant people, and faithless to a sacred trust; but if we upbuild this state, cultivate the soil, extend our trade, help the poor, respect the moral and civil law, preserve the constitutional guarantees of personal rights, and maintain liberty, we shall be blessed by our children and shall receive the sweet approbation of Heaven."

A few days later Judge Steele received the following letter:

> My Dear Judge—I want to express my appreciation of the remarks you made at the banquet the other night. I am proud of the fact that you are now the chief justice, and I am also proud of the fact that the chief justice of our Supreme Court should think that there is something to be boosted besides material prosperity, and that there is such a thing as character which is more important than dollars. Sincerely yours,
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* * *

Quite a unique experience in public dinners was that of the Garfield banquet, which was held in Denver June 20, 1907. James R. Garfield, then secretary of the interior, had come to the West to allay, if possible, the rising tide of popular disapproval of the conservation policy of the Roosevelt administration. As head of the department he was ostensibly the object of the many severe criticisms that had been made, and among the prominent guests at the banquet the majority had been either outspoken in condemnation or manifestly in sympathy with the critics of the president and his secretary. It was Justice Steele who was chosen to preside over a situation where the elements of a social and political explosion were dangerously apparent. With rare tact and good humor Justice Steele accomplished his difficult task. The son of the martyred president found himself encircled by friends and well-wishers, and, while none of the just claims of the West were abated, the possibilities of a friendly understanding and compromise of conflicting interests were greatly advanced. A few days later Justice Steele was greatly pleased to receive from Hon. J. C. Helm the following note:

"My Dear Judge—Consider yourself retained as official toastmaster at all of my banquets during the rest of your natural life. I congratulate you. Before the entertainment I was sorry for you; when it was over I was envious of you. You did splendidly and contributed in large measure to make the occasion the magnificent success it was."

* * *

On December 11, 1908, a public meeting was called in the Denver auditorium to protest against the surrender of a Russian political refugee whose extradition had been demanded by the Russian government for alleged criminal offenses. The principal speaker was Mrs. Mary C. C. Bradford, who was introduced by Judge Steele in these words: "The next speaker is a direct descendant of a signer of the Declaration of Independence. When you hear her voice and her words, you will realize that the Liberty Bell has not ceased to ring."

Judge Steele further said:

"We are assembled in this splendid structure, erected by the command of the people of Denver, to protest against the degrading of the friendly processes of extradition to the base use of wringing from witnesses the secrets and the names of Russian revolutionists. We are here to protest against the surrender of the refugees from political persecution to the minions of the czar, believing from the experience of those who have voluntarily returned that they will not be afforded a trial and will be murdered immediately upon reaching the domain of Russia. Individually I do not believe that these men will be surrendered, unless under the treaty they should be, and I am willing to submit to the judgment of the secretary of state. He knows, as well as we do, that this government was founded by revolutionists for revolutionists, that this government has never surrendered a political refugee, and that to do so would merit the reprobation of the civilized world. Under the guise of the charge mentioned in the treaty it has been many times attempted, but at no time has a political refugee been surrendered. Great Britain has tried it; Canada has tried it; Mexico before the republic tried it. But the answer always has been that this country is an asylum for the political refugee of every clime. So I do not fear that these men will be improperly surrendered. But I would take this occasion to send greeting to the Russian revolutionists and say to them that our hearts throb in sympathy for them and that we sincerely wish that they may, upon the ruins of a despotic and tyrannical government, build a nation dedicated to liberty."

* * *

At a celebration of the fiftieth anniversary of the discovery of gold in the Rocky Mountains, at Idaho Springs, May 7, 1909, Judge Steele delivered an address, in which, after reviewing some of the early history of the region, he said:

"Our fathers transmitted to us the gifts of civil and religious liberty, to be kept inviolate for transmission to our children. Let us, on the fiftieth anniversary of our beginning—as we did at the start and upon our admission—resolve to transmit to our children the liberty transmitted to us. If, through indifference or inattention, these gifts are lost to us, we shall be faithless to our children and recreant to a sacred trust. We cannot maintain them inviolate if the wicked among us lose theirs. They were given for wicked and pure alike. Let us upbuild our state and still maintain our liberties; transmit to our children wealth if we must, but grapple the gifts of liberty to your souls with hoops of steel, as you should your true friend, or they will escape you. The struggle is eternal. You must gather the manna of liberty daily, to use it.

"If you leave your children a land governed by a privileged class and not by all the people—a land where the laws grind the poor and the rich men rule the law—you will leave them poor indeed. But if you maintain liberty, preserve the constitutional guaranties of personal rights, respect the moral and civil law, your children will bless you forever and forever.

"Let us express the sentiment proclaimed in the first issue of the first paper published in this section:

"'Hurrah for the land where the moor and the mountain
Are sparkling with treasures no language hath told;
Where the wave of the river and spray of the fountain
Are bright with the glitter of genuine gold.'"

* * *

July 14, 1909, Judge Steele, on account of the unforeseen absence of Governor Shafroth, was requested to make the speech of acceptance at the unveiling of the Soldiers' monument on the capitol grounds. He said:

"In the absence of the governor I have been detailed to accept on behalf of the state this specimen of the craftsman's art. It is accepted as a completed work. It is not my province at this time to recount the achievements of the Colorado boys. The names inscribed on the monument will stir the soul of everyone familiar with our history, and the surmounting figure represents the soldier facing the south ready to repulse the advance of the enemy. The bitterness of that struggle has been forgotten, and the Union was cemented upon the appearance of a common foe, and now soldiers of the North and of the South march side by side to strew the wealth of spring upon the graves of the fallen brave. More than forty years ago our sister, New Mexico, dedicated a monument to the valorous soldiers of Valverde, Apache Cañon and Glorietta, and it is proper that we, although tardy, should erect this memorial in commemoration of the Colorado soldiers who did so much to save this region to the Union.

"All honor to the First Colorado, that marched across the trackless waste, braving its perils and burdens to check Sibley's advance upon our beautiful treasuries. All honor to the Second Colorado that protected the white settlements from the butcheries of the redskins. All honor to the Third Colorado for its great achievements in Kansas and Missouri.

"Most of those engaged in that war between brothers have spread their tents on the eternal camping grounds. Let us extol the survivors while they live; let us mourn the departed, while

"'Glory guards, with solemn round, the bivouac of the dead.'"

* * *

In an address, delivered before the Sons of Colorado, of which society Robert Steele was an honored member, in March, 1910, he paid a tribute to the cottonwood tree. Referring to the double celebration in 1876 of the centennial of the nation and the birth of the state, he said: "We knew that there would be no such pomp and military display here as we had seen in the East, but we did know the temper of our people, and we knew that they were patriotic and true, and that they would celebrate the occasion as only loyal people can. We knew that there would be no lavish display of palms and smilax, of the Marechal Niel, and of rare and beautiful orchids here; but we did know that from the profuse gifts of Nature willing and loyal hands would gather our own bluebell, our own flax, columbine, aster and clematis, and withal, our choicest lily, and would entwine with these gifts of Nature the Stars and Stripes and decorate the homes and public places with these and our native evergreen and cottonwood.

"Let me, right here, pay a tribute to the humble cottonwood. She is unpopular now; her more beautiful and aristocratic sisters have taken her place; but she was, in her time, the admired of all admirers. Responsive to our desires, she swiftly beautified our new cities and towns; she furnished the pioneer of the plains wood for his fire; her boughs afforded him a means of decoration; her shade gave him a retreat at noontime on the dreary way; she stood as a beacon inviting the thirsty traveler to refreshment and rest; 'like the shadow of a great rock in a weary land,' she was the refuge of man and beast. How proud she stands, while looking down with scorn and contempt upon the ambitious tenderfoot tree that has been wrecked and dismantled by a late snow. She was the wise and faithful friend of the pioneer, and the Sons of Colorado love her.

"And now let us, Sons of Colorado, remembering the environment and associations of our state's birth, reaffirm our allegiance to the cause of liberty; let us display the national emblem on the state birthday; let us count him as an enemy to be shunned who seeks to deprive us of our liberties through the transgressions of the wicked, and as we pay homage to the Kohinoor of nations let us pay homage to the bright particular gem in the diadem of states.

"'O, make Thou us, through centuries long,
In peace secure, in justice strong;
Around our gifts of freedom draw
The safeguards of Thy righteous law.'"

* * *

So through the years Robert Steele, as he found opportunity, worked for the upbuilding of the community in which he lived, for the maintenance of the American ideals of citizenship, for patriotism and justice, for humanity and civic righteousness among men.

CHAPTER VII

THE RIGHT OF PERSONAL LIBERTY

"No freeman shall be taken or imprisoned or disseized or outlawed or banished or in any ways destroyed, nor will we pass upon him nor will we send upon him unless by the lawful judgment of his peers or by the law of the land."

—THE MAGNA CHARTA, Section 32.

"In order to assert our rights, acknowledge our duties, and proclaim the principles upon which our government is founded, we declare: * * *

"That all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great;

"That excessive bail shall not be required, nor excessive fines be imposed, nor cruel and unusual punishments inflicted;

"That the privilege of the writ of habeas corpus shall never be suspended, unless when, in case of rebellion or invasion, the public safety may require it;

"That the military shall always be in strict subordination to the civil power; * * *

"The trial by jury shall remain inviolate in criminal cases; * * *

"That the people have the right peaceably to assemble for the common good, and to apply to those invested with the powers of government for the redress of grievances, by petition or remonstrance;

"That no person shall be deprived of life, liberty or property without due process of law."

—COLORADO CONSTITUTION, Bill of Rights.

"When we deny to one, however wicked, a right plainly guaranteed by the constitution, we take that same right from everyone. * * * We cannot change the constitution to meet conditions. We cannot deny liberty today and grant it tomorrow; we cannot grant it to those theretofore above suspicion and deny it to those suspected of crime, for the constitution is for all men, 'for the favorite at court, and for the countryman at plow,' at all times and under all circumstances."

—JUSTICE ROBERT W. STEELE, the decision in the Moyer case.

HUMANITY builds upon the failures as well as upon the successes of former years. Each generation is the heir of its predecessor, and human progress is made possible by the fact that a great volume of established truth and material accomplishment is the birthright of mankind. This mass becomes the foundation and the instrument and to a large degree the material of further progress. For each individual to test by his own intelligence and experience the accumulated store of human knowledge is obviously impossible. It would be absurd for the men of any period to refuse to accept all that they have not created and established and proved for themselves. Yet if every belief of general acceptance were never thereafter to be questioned, if every theory commonly supposed to be proven were placed beyond the reach of doubt, the world would be bound fast to the body of error and progress would become impossible. The exceptional individual, be he great reformer or mere crank, never hesitates to question any belief or test any truth, however well established. In the vast majority of political experiments, naturally, the consensus of human opinion is sustained, the conclusion of human experience is justified. But in the rare exception error is overthrown, ancient truth is restored or new wisdom is developed, and humanity rises to a higher level because a single man dared to hurl defiance in the face of a scornful and hostile world. The highest wisdom of statesmanship often consists in knowing what to maintain, what to surrender, and what to accept from among the continual propositions of change.

There are periods when the spirit of reorganization seems to be more than usually prevalent. The foundations of social and political institutions are called in question. Truths that have been commonly accepted as most obvious are assailed with doubts. Startling pronouncements of new truth or ancient error are proclaimed with vehement dogmatism. The public ear is assailed on one side by the joyous shouts of the prophets of a new era and on the other by the lamentations of those that fear that the principles as well as the institutions of law, order, justice and liberty are being swept away. Such a period came in Colorado in the closing years of the nineteenth and the early years of the twentieth century. The same spirit of doubt, unrest and disturbance was generally prevalent throughout the nation, but there was developed out of the peculiar conditions existing in Colorado certain special features that impressed themselves with dramatic intensity upon the public attention. The issues here presented involved the most fundamental principles of government. Their passionate discussion reached the stage of civil war. Their ultimate settlement gave a broad and solid basis for future development and constituted a very important step in political progress.

Two forces were strongly at work in those years, either of which threatened the destruction of American institutions. One of these forces, and the lesser in its danger to the state, was that of lawlessness and anarchy as manifested in the Cripple Creek strike of 1894, the Leadville strike and riot of the same year, the disturbances and riot at Telluride in 1900, and the Cripple Creek war of 1903. However alarming the threat of these disorders may have appeared, they never at any time held the possibility of lasting or permanent injury to the structure of free institutions. Riot, anarchy, violence and murder, theft and the destruction of property, are criminal acts that ought to receive punishment. They are hostile to the principle of government. They tend toward the destruction of the social organization. But these crimes could never become the structure of government. They were local and temporary disorders, and, whatever of injustice or of cruelty they involved in individual cases, there was never the least danger that they would come to be the regular and established order of things. Anarchy is not government; it is the absence of government.

The threat that came from another source was quite different. Events and conditions had tended to make the structure of one of the two great political parties of the state for a short time almost the personal property of a single man. They had developed in Denver and in some other counties a bi-partisan machine quite independent of political principles. They had made it possible for a time to defy the will of the majority of the party in the nomination of candidates and the will of the majority of the people in matters of legislation. These things constituted a usurpation rather than a destruction of government. The logical consequence of a control of the party through machine politics was a domination of the state through machine government. A permanent establishment of machine government would be oligarchy and not democracy. Such a change would involve a transformation of the principles as well as the structure of the American republic. It would be a violation in fact and in theory of the central principle of Americanism, the rule of the people by the free will of the majority. It would be a new form of government, the permanent establishment of something else in place of the American republic that was founded by the makers of the constitution.

It is not necessary to consider, as some have done, that individual men were moved by a deliberate purpose to the overthrow of democratic institutions and to the establishment of an altered system of government for the oppression of their fellow men. The primary cause and condition was that the spirit of change was strong in the minds of men, that old forms had become outworn, that abuses had grown intolerable, that two principles of government were struggling for the mastery. To honest men of one way of thinking it seemed that additional means of defense must be provided in order to save society and government from the attacks of rioters, incendiaries, plunderers, demagogues and visionaries. Other men, equally honest, had the clearer vision that the permanent safety of the republic could only be secured by keeping the field of public activities forever free from those barriers of class and privilege that had been destroyed at a cost of tremendous effort and suffering in ancient years and by maintaining every safeguard of the people's rights and liberties that had been written into the constitutions of the nation and the state. One class wished to make permanent the conditions of machine politics; the other to overthrow evil practices and to restore the full measure of popular self-government.

While the active forces of machine politics and gang government were striving with apparent success to make permanent their control of public power, the will of the people was inclining more and more toward a radical reform of the crying evils of politics. The use of public power for personal and partisan advantage against the people's will and interest, the persistent refusal to enact legislation continually promised in party platforms, the nomination of candidates in flagrant violation of the popular preference, the use of party names and party principles as mere catchwords in the game of machine politics, had at first disgusted the people and later roused them to an earnest purpose.

Had there been enlisted on the side of machine government only the machine bosses and their subordinates, together with those persons having a selfish interest in securing special favors or exemptions from a government which they in some way controlled, the attack upon American institutions from this side would have been scarcely more dangerous than was that of the socialistic visionaries, the demagogues and the rioters. The masses of American citizenship, conservative, intensely patriotic, devoted to law and order, were easily shocked by the vision of anarchy revealed in the disorders at Cripple Creek, Leadville and Telluride. In approving extra-constitutional measures to defend the state against the flagrant assault of men that openly professed an exultant disregard of the rights of property and person, too many sober-minded citizens overlooked the fact that they were yielding their own constitutional rights and liberties to usurpers who were taking advantage of every opportunity to strengthen their hold upon the public power.

Whether unscrupulous politicians and others conspired to promote disorder and sedition, from which they hoped to profit, is a minor point. The important thing is that the lawlessness and crimes attending the strikes in the mining districts were used in the effort to fix more firmly upon the people the bonds of machine government. If, on the other side, men without any participation in criminality or sympathy with lawlessness were led into a defense of lawbreakers, or into a violent resistance of those who were misusing their rights of property or their possessions of public power, that was only a natural incident of this troublous time.

The culmination of the struggle between these forces of change was reached in the ten-year period from 1900 to 1910. During that time Robert W. Steele was a justice of the Supreme Court of Colorado, and it was while he held that high position that four cases were presented to the court which involved the most fundamental and elementary principles of personal liberty and of the American system of free government. It is a matter of history rather than of political opinion that the Supreme Court of the state was packed by political machine methods in order to secure decisions favorable to certain interests. There has been argument as to whether this procedure was justifiable under all the circumstances, but no serious denial of the fact. In his opinions in these cases, Justice Steele was in the minority, not because there were no honest judges among those that held a contrary opinion, but because the practices of machine politics had resulted in the appointment or election of a majority of judges who were known to favor political principles and methods to which Justice Steele was opposed and which were inconsistent with American free government by the will of the people.

Robert Steele came to the Supreme Court direct from his work among the boys and girls, the widows and orphans, the insane, the unhappily married and others that had benefited by his care and interest in the County Court. As was his invariable custom, he made no active effort to secure the nomination. Under the political conditions then existing, a fusion ticket was necessary. The place of Supreme judge was allotted to the Silver Republicans, and the name of Robert W. Steele was presented to the convention by his friends of that party. He was nominated by acclamation, and in the following November was elected by a large majority. His election was generally conceded from the day of his nomination. His opponent on the regular Republican ticket was G. C. Bartels, also a Denver boy and a man of the highest standing as to character and ability. Between him and Judge Steele from early years a warm and close friendship had existed, and either of the candidates would have been glad on personal grounds to see victory incline to his opponent. Under the political conditions of that year, however, Mr. Bartels accepted the nomination mainly as a matter of form and made no active canvass.

Commenting upon Judge Steele's nomination, the *Rocky Mountain News* of [illegible]ptember 14, 1900, said:

> "Judge Robert W. Steele, candidate for supreme judge, is at present county judge of Arapahoe County, an office which he has filled to the satisfaction of the bar and the public. As county judge he has charge of all estates, and his record is absolutely clean.

Of studious temperament and judicial mind, Mr. Steele has grown in every direction since his elevation to the bench, and in the highest court of the state will bring ability, discernment and painstaking labor to the determination of every case."

The measure of Judge Steele's popularity at this time is well evidenced by the following comment from *George's Weekly*, a Denver newspaper, of January 12, 1901:

> "We believe that Bob Steele is going to make one of the best judges that ever sat upon the Supreme bench. It is a fact pretty generally conceded that Bob is going to do right as far as he knows how, and we don't care if such men occasionally make mistakes. The mistakes we object to, and the class of judges we don't like, are the judges who sit upon the bench and make decisions because they are paid to make them, or because their own personal interests demand them to make unjust decisions. We don't believe that Judge Steele will ever hand down a decision that does not agree with his conscience, and we look forward to a season of justice from this source that will be gratifying. Bob has a host of friends among the young men of this state, and they all wish him well, and if he discharges his duty as they all think he will, there are higher honors in store for him. The state of Colorado is looking for young men of his class. They are needed."

Robert Steele did not go into the Supreme Court as a political partisan, nor as the representative of any class among the people of the state. He went there as the representative of the people among whom he had grown to manhood, whom he knew and by whom he was known. He was elected by citizens who had implicit confidence in his integrity and his patriotism. He accepted his nomination and election modestly, distrusting his own ability and merit, doubtful of his own worthiness for the honor that had been conferred upon him, but fully determined to do everything in his power to maintain the high regard of his fellow citizens, and, above all, to hold fast to his own clear ideals of civic loyalty and righteousness.

Clear of partisan entanglements, free of class prejudice, fresh from the people, and without even that professionally judicial bias that comes from long association with the upper courts of law, with unspotted integrity, with intense patriotism and with broad and impartial humanity, Justice Steele entered upon the duties of the high position to which destiny and the voice of the people had called him. But he had even more than those qualifications for his task. He had a judicial mind, unimpassioned and impartial. He entertained no prejudices. Rich or poor, proud or humble, powerful or weak, all men stood upon an equal footing when they came before him, and he judged them according to the three great principles of eternal justice: law and equity and mercy. He never usurped powers to which he was not fully entitled, but he used the authority and the discretion that the laws wisely allow to the judge, according to the spirit of the law, for justice and humanity.

Above all, he had that instinctive perception of right, that intuitive apprehension of equity, that immediate grasp of the fundamental principles involved in any matter presented to him, which constitute, in the highest degree, the proper qualification for the judge of a court of last resort.

Having reached his conclusion according to the best measure of his intellect and conscience, he never hesitated to maintain it against whatever opposition it might encounter. He was always ready to consider the opinions of other men. He often sought counsel. But, when his mind was made up, he stood for what he believed to be right, regardless of all save his clear sense of duty to the people and of responsibility in the high office he held.

Of all the cases that came before him in the Supreme Court, the Moyer habeas corpus case was the most important, both as regards the fundamental constitutional principles involved and as regards its bearing upon the problems foremost in the public mind during this period. The Moyer case immediately concerned the security of an individual from arrest and imprisonment by the arbitrary act of a military authority. The circumstances of that act seemed to justify it to many minds as a necessary measure of the enforcement of public authority, and of protection for the public safety. Justice Steele's faultless logic reached through the entanglement of local conditions and temporary disorder, and recognized in the overthrow of the constitutional safeguards of the bill of rights the abandonment of the innermost citadel of liberty, the relinquishment of one of the greatest prizes of the long struggle for popular self-government, the surrender of a weapon with which the minority might, at another time and under other conditions, effectuate its overthrow of the American republic and establish an oligarchy by military power.

The dissenting opinion of Justice Steele in the Moyer case will be found printed in full as the next chapter of this book. It is so comprehensive in its statement of facts, of principles and of authorities that no additional word remains to be said upon those matters. The most favorable comment that can be made upon the majority decision is that it ignored the constitution and misrepresented the authorities in order to serve a fancied passing need of public safety. The least that can be said of Justice Steele's opinion is that it is a clear, complete and unanswerable argument in defense of a principle that runs back to the beginning of a constitutional bulwark for personal liberty. It is, moreover, a terrific arraignment of the forces then operating toward the destruction of the basic principles of American government, and a revelation to the people of the dangerous situation in which they were at that time.

Justice Steele's opinion found an immediate response throughout the state and the nation. No other expression of a Colorado court was ever so widely heralded or commented upon, and few decisions of any court have been more generally repeated and approved. Its central declaration, that the citizen is safeguarded by constitutional provision against arbitrary imprisonment by the military power, with its attendant declarations that the military must always be subordinate to the civil power, and that the legislature and not the executive has the authority to declare the existence of insurrection, were everywhere recognized as fundamental to personal liberty and as essential to the maintenance of the republic. Too many states were engaged in struggles similar to that of Colorado to make it possible for the voice of approval to be universal.

From among the many newspaper comments upon the opinion it is possible to select only a few, choosing those of special significance.

From the Detroit (Mich.) *Free Press:*

> In the turmoil and strife that has rended Colorado for many weary months, the opinion of Judge Steele shines through the smoke and carnage like a ray of hope. He has refused to be blinded to the purposes for which the constitutional safeguards of liberty and independence were made, and, despite the distracting influences, he has kept in mind the spirit of our institutions and the necessity for the fullest measure of liberty consistent with the maintenance of government. * * * Despite the appalling conditions, there has never been any proof that it was necessary either to suspend the writ of habeas corpus or to declare martial law. The protection of the militia could have been afforded, peace and order maintained, riots quelled and good citizenship vindicated without resort to any of the methods that have aroused general indignation and have been such a despotic abuse of power as has never been equaled in free America. The strikers, even in the affected districts, have always been in the minority. To deprive other citizens of the protection of the law, to override the civil authorities and to utilize such drastic measures as deportation has been tyrannical, and as a precedent under judicial interpretation a misuse of power that is alarming. The decision of the Colorado Supreme Court would not be regarded as good law in any other state of the Union. Judge Steele's dissenting opinion, on the other hand, stands as a clear and reasonable interpretation in accord with the spirit of our institutions and reassuring that Colorado has yet within its borders one man wholly sane and cool-headed.

From the Pittsburgh (Pa.) *Dispatch:*

> It is regrettable that the opinion of Justice Steele becomes only a part of the record in the Moyer habeas corpus case, while a decree

was based upon the decision of his two colleagues. * * * What American can quarrel with the postulate that Moyer, of whatever crime guilty, demands specified charge and due trial? Even now he rests in some jail without further reason than that a governor in exercising military power has abdicated civil, a subordination of one to the other, the reverse of that which he took an oath to uphold. Sowing of dragon's teeth the whole miserable Colorado story has been. Foreign journals are commenting upon it with amazement and lack of comprehension, and in this bewilderment they do not differ from citizens in America.

From the Cleveland (Ohio) *Leader:*

Although he was the only justice to dissent from the recent decision of the Colorado Supreme Court sustaining the governor in the exercise of arbitrary power, Justice Robert W. Steele is undoubtedly right. Surely his dissenting opinion, which has just been published, after nearly a month of careful consideration, will meet with the approval of all fair-minded and liberty-loving people.

From the Duluth (Minn.) *Herald:*

Justice Steele of the Colorado Supreme Court stands alone among the judges in his opposition to the arbitrary and unconstitutional acts of Governor Peabody. But one man with God on his side is in the majority, and it will be demonstrated in the final show-down that Judge Steele is with a majority of the people of Colorado and of the United States.

From the New York *Evening Post:*

Justice Steele's opinion emphasizes an open question which stands much in need of settlement, namely, the powers of the courts during temporary military control of a district. The decision of the Colorado Supreme Court seems merely to have evaded the problem.

From the Denver (Colo.) *Rocky Mountain News:*

The document will meet with the approval of nine out of ten of the bar of Colorado and will rank with the opinions of the most learned judges of England and America in cases involving the great constitutional issues of personal liberty.

The general publication of Justice Steele's opinion in the newspapers brought to him a host of letters, some from old friends, many from lawyers in Colorado and elsewhere, and a large number from total strangers who had no other purpose than to express their approval of a decision that was primarily a defense of human liberty, and of a judge that had clearly seen the right and bravely dared to maintain it. Only a few of these may be quoted here to indicate how the decision was regarded by the men of that time.

From an old friend:

My Dear Bob—I have just finished reading your opinion in the Moyer case. Have read it all very carefully—some paragraphs several times. I was fully prepared to be interested, but I have been more than interested—very much impressed. I am a little afraid that I have shared in a more or less common Denver feeling that Moyer is a dangerous man and that it was excusable to stretch the law a bit to hold him. I am also somewhat prejudiced against union men.

But I have a wholesome respect for what is right, too, even for those who do not deserve any favors, and I must say that your presentation of the right and wrong of this situation is simply unanswerable. It reminds me of what I said this afternoon, viz.: That you see the right more clearly than other people do, and you have the courage to express your views without dodging.

I cannot doubt that both the governor and the other justices knew from the first that the habeas corpus privilege could not be suspended. But they did not want to face that view of the situation, and they will not face it now. But it was there—fairly and squarely —even though they shut their eyes to it.

I am sure your decision is the only law that will stand the approval of time, and the only one that will live. I think you will be proud of it as long as you live, and your children and grandchildren will be proud of it.

It takes a clear head and a sound conscience and a courageous heart to take a stand like that in such a time, but it was right, and it will grow, and the more I think of it the prouder I am that you did it. It is the event of your lifetime up to date.

— — —

From a Denver lawyer:

My Dear Judge—Dissenting opinions, though not immediately controlling, sometimes work both through unseen and practical influences toward the accomplishment of great results. In questions of great public moment, affecting life or liberty, judicial decisions inspire the keenest interest and vigorous protests against palpable fallacies sink deep into the public conscience, where, taking root, they spring ultimately into life and vigor. We have had instances of this sort in the past and will have them in the future. It was the dissenting opinion in the Dred Scott case which gave hope to the nation and from which ultimate deliverance came. And so in time to come the Moyer case will be known, not by what the court decided, but by the magnificent protest you have registered in the cause of right and justice. I feel that you have spoken for us all, that you have shown some of the depths of the abyss into which the majority opinion is haling us. And I know that those who read and ponder upon it must be convinced. May you live long to adorn the place you so nobly fill, is the earnest prayer of

YOUR FRIEND.

From another lawyer:

My Dear Judge—I have just finished reading your dissenting opinion in the Moyer case, and wish to congratulate you upon its convincing presentation of the law. I feel that the people of the entire state are to be congratulated in having at least one member of our Supreme Court who fearlessly makes a stand in defense of those personal liberties of our citizens for which our republican form of government was founded and preserved.

I cannot but feel that your opinion will live as a landmark in judicial decisions when the majority opinion of the court has been either forgotten or mentioned as a mere by-word.

You have handed down what I consider one of the greatest opinions ever delivered by our Supreme Court and upon a question that the majority opinion has not settled to the contrary and which never will be settled until settled right.

The people of this state will surely never set their seal of approval upon the doctrine of absolutism and despotism announced in the majority opinion, but I am firmly convinced they will sustain and support the principles so clearly and logically enunciated in your splendid opinion. Sincerely yours,

— — —

From a Denver business man:

My Dear Judge—I know as well as you do that righteous and just actions always return their full measure of reward to the actor. Therefore, I know that, in your judgment in the Moyer case, you did complete justice to yourself and your country, and therefore need no praise of ours. Still, we cannot suppress our desire to thank you, as sincerely as words can be made, to express our gratitude to you for the good faith to your constituency, and the appreciation of justice and equity and the foundation principles upon which our government must survive, if at all, displayed in that decision.

Trusting that every blessing that can follow such righteous action will come to you, as ever,

— — —

From a former Denver resident:

Portland, Ore., July 2, 1904.

My Dear Judge—Will you permit a good friend, well wisher and admirer, even though he has left Colorado, to extend his congratulations to you on the extremely courageous, clear and able opinion which you rendered yesterday in the Moyer case? It will do more for Colorado than the building of the Moffat Road, for it strikes down deep into the fundamentals; and, coming from a judge of a court of last resort, even though it be a minority opinion, it shows a perception of safe, sane and constitutional methods that is peculiarly refreshing and hopeful at a time when so many people seem hopelessly adrift from their moorings.

Yours very truly,

— — —

An opinion from St. Louis:

St. Louis, July 6, 1904.

Dear Sir—I have just read your dissenting opinion in the Moyer case and take this opportunity to say that, in my opinion, it is an unanswerable exposition of what the law in our state was, and what it should be.

I regard the decision of the majority as a calamity, and cannot believe that it was well considered in all of its bearings upon the future. I am highly gratified that your dissenting opinion is so full that it, for all time, shows the law as the forefathers settled it and makes any further citation of authority unnecessary.

Sincerely yours,

— — —

From a prominent citizen of Kansas:

Versailles, Mo., July 2, 1904.

My Dear Sir—As an American citizen who loves justice and liberty, I desire to thank you for your unanswerable dissenting opinion in the Moyer case. I am not a miner, nor am I a member of any labor organization, but I have no hesitancy in saying that, in my judgment—and I think it is the opinion of a large majority of the fair-minded people of this country—the action of Governor Peabody is the most infamous and outrageous assault upon the constitution and liberties of the people ever perpetrated by any official in the United States. The management of the labor troubles in Colorado by the governor has made more anarchists during the past six months than have come to this country from foreign lands during the past ten years. Very truly yours,

— — —

From a lawyer of Fort Wayne, Indiana:

I read last night with great pleasure the opinion of Justice Robert W. Steele on the suspension of the writ of habeas corpus by Governor Peabody, and it is one of the ablest and most eloquent dissenting opinions I have ever read and the conclusion reached by the learned judge meets my hearty approval. I note with some pride that our Supreme Court in two cases in 1863 and 1864 fully supports Judge Steele. In years to come this opinion by Judge Steele will be the law of Colorado also, and if you and I live a reasonable time we will see this opinion cited as one of the strongest on the suspension of the writ of habeas corpus, and will prevent oppression by unscrupulous or designing enemies of our government.

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A letter from Brooklyn, N. Y.:

My Dear Sir—Accept congratulations upon your dissenting opinion rendered in reference to refusing a writ of habeas corpus to Charles H. Moyer, president of the Federation of Miners, who was detained and held as a military prisoner by order of the governor of your commonwealth. Permit me to state that I am in no way interested in the matter, save from a legal and constitutional interpretation of the law. We had a discussion at my office very recently relative to dissenting opinions. The majority of the attorneys were in favor of having no dissenting opinions written or made public, they being of the opinion that the majority should determine and rule the decision, and that the public should not be made aware of any dissent in the final ruling of the highest courts of record of the state.

Your action and opinion so recently rendered bears me out in my argument, and upholds the position which I took in the recent interview, and I lost no time in presenting your opinion in justification of my argument.

I would further state that I fully believe that your opinion would be upheld and sustained by the United States Supreme Court.

Again congratulating you upon your wisdom, keen judgment and legal decision, I remain with respect,

Yours very sincerely,

— — —

Possibly the most notable tribute to the strength and convincing logic of the minority opinion was that of Chief Justice Gabbert, who delivered the original opinion of the court, and who considered it advisable, after the minority opinion had been presented, to file an extraordinary and supplementary opinion, in which he practically admits the overwhelming proof of Justice Steele's main points, but maintains the amazing and monstrous doctrine that, though the governor may not have the power to declare martial law or to suspend the privilege of the writ of habeas corpus, he and his military subordinates have the right to do anything they may please to do for the alleged purpose of suppressing insurrection, and the judicial department has no right to call them to account for their actions.

"It is not held," said the chief justice in his supplementary opinion, "that the governor has the power to suspend the writ of habeas corpus or declare martial law. No opinion is expressed on either of these propositions, and hence all that is said in the dissenting opinion on these subjects and the voluminous excerpts are foreign to the questions involved. It is determined that the petitioner was not entitled to his discharge, not because the privilege of the writ of habeas corpus was suspended, or the governor had declared martial law, but for the reason that the governor, through his subordinate officers, was exercising a power conferred upon him by the fundamental law of the state. * * * This power and the conditions under which it may be exercised is, by the fundamental law of the state, vested in the governor and in him alone. If the judicial department should undertake to review the facts upon which the governor acted, it would be a direct interference with his authority and an assumption of power on the part of the judiciary which does not exist. * * * The constitution has clothed the governor with the power to take the steps he did, and he cannot be called to account by the judicial department for this action, nor can the latter inquire into or determine whether or not the conditions existed upon which he based his action. That is a matter which, in the circumstances of the case, the chief executive must determine for himself, and his subordinates, acting in obedience to his orders, must determine for themselves, and when so determined, is conclusive."

CHAPTER VIII

THE OPINION IN THE MOYER CASE

THE following is the complete text of the opinion of Justice Robert W. Steele, of the Supreme Court of Colorado, in the Moyer habeas corpus case, as handed down by him June 30, 1904 (35 Colo., p. 170):

No person who has the slightest claim to respectability should hesitate to approve the action of the governor in enforcing the law, and I am willing to uphold him and to applaud him so long as he keeps within the lines of the constitution. But I am not willing to uphold him when, in my opinion, he breaks down the barriers erected by the people for their protection, nor am I willing to accord to the constitution elastic properties for the purpose of sustaining him, nor to join in the establishment of a precedent which will not apply to other classes or other conditions when another governor undertakes to exercise the same arbitrary power.

I am not willing to concede the power claimed by the governor and exercised by him, because, in my opinion, such power is not vested in him by the constitution. The people could never have intended to erect such an engine of oppression.

It follows, of course, that if the present executive is the sole judge of the conditions which can call into action the military power of the government, and can exercise all means necessary to effectually abate the conditions, and the judicial department cannot inquire into the legality of his acts, that the next governor may by his edict exercise the same arbitrary power. If the military authority may deport the miners this year it can deport the farmers next year.

If a strike which is not a rebellion must be so regarded because the governor says it is, then any condition must be regarded as a rebellion which the governor declares to be such; and if any condition must be regarded as a rebellion because the governor says so, then any county in the state may be declared to be in a state of rebellion, whether a rebellion exists or not, and every citizen subjected to arbitrary arrest and detention at the will and pleasure of the head of the executive department. We may then, with each succeeding change in the executive branch of the government, have class arrayed against class, and interest against interest; and we shall depend for our liberty, not upon the constitution, but upon the grace and favor of the governor and his military subordinates.

In no other case presented to this court have principles so important and far-reaching been involved. It was elaborately and ably argued, and the position of counsel was clearly defined; yet the court has evaded the fundamental questions presented, and has based its decision upon theories long ago determined by jurists and statesmen to be illogical and false.

On the part of the petitioner it was urged that he was illegally restrained of his liberty, that a court of competent jurisdiction had ordered him released on habeas corpus, and that the military authorities had refused to release him and had refused to permit the civil authorities to serve process upon them.

On behalf of the military officers, it was said that they had been ordered by the governor not to release upon writ of habeas corpus, and on behalf of the governor it was contended that he had declared the county of San Miguel to be in a state of insurrection and rebellion, and that under such conditions he had authority to enforce martial law and to suspend the privilege of the writ of habeas corpus.

As these propositions strike at the very foundation of our government, as the court has evaded a consideration of them, and as I believe they present the only questions in the case, I shall discuss them and ignore for the present a consideration of the opinion, with the observation that it establishes a precedent that is so repugnant to my notions of civil liberty, so antagonistic to my ideas of a republican form of government and so shocking to my sense of propriety and justice that I cannot properly characterize it.

We should have before us the facts. The governor of the state, on March 23, 1904, by his proclamation, said:

> "Whereas, there exists in San Miguel County, Colorado, a certain class of individuals who are acting in conjunction with a certain large number of persons outside of said county, who are fully armed and acting together; and,
>
> "Whereas, open and public threats have been made to resist the laws of this state and offer violence to citizens and property located in San Miguel County; and,
>
> "Whereas, at divers and sundry other times various crimes have been committed in San Miguel County, by or with the aid and under the direction of said vicious and lawless persons; and,
>
> "Whereas, threats, intimidations and violence are threatened and believed will be resorted to by said lawless class of individuals; and,
>
> "Whereas, it is stated to me by the sheriff of said San Miguel County that these forces within and without said county are about to join forces within said San Miguel County, for the purpose of destroying property and inflicting personal injuries upon the citizens of said county; and,
>
> "Whereas, by reason of such lawlessness and disturbances and threatened acts of violence, the civil authorities are unable to cope with the situation;
>
> "Now, therefore, I, James H. Peabody, governor and commander-in-chief of the military forces, by virtue of the power and authority in me vested, do hereby proclaim and declare the said county of San Miguel, in the state of Colorado, to be in a state of insurrection and rebellion."

In the petition for the writ of habeas corpus filed herein the said proclamation is set forth, and it is alleged that the petitioner, while he was in the county of Ouray, was arrested upon a warrant issued by a justice of the peace of said San Miguel County, and was conveyed to the county of San Miguel, where he gave bond in the penal sum of $500 for his appearance before the District Court of said county on May 10, 1904; that upon his discharge from the custody of the sheriff he was arrested by the adjutant general of the state, who was then in the county of San Miguel as the commander of a portion of the national guard of the state; that upon March 30, 1904, a writ of habeas corpus was issued by the judge of the District Court within and for the county of Montrose, returnable on April 11, 1904; that upon the said 11th day of April, no return having been made to the writ, the court ordered the discharge of the petitioner, but, notwithstanding the order of the court, the said respondents refused to discharge him; that the petitioner is not guilty of any offense, has violated no law, and that no indictment, information or complaint has been filed against him except the complaint mentioned under which he was admitted to bail; that the charge in the said complaint is without foundation, and the said respondents have refused to file complaint against the petitioner, and have refused to inform him of the charge against him.

This court thereupon issued a writ returnable April 21 following.

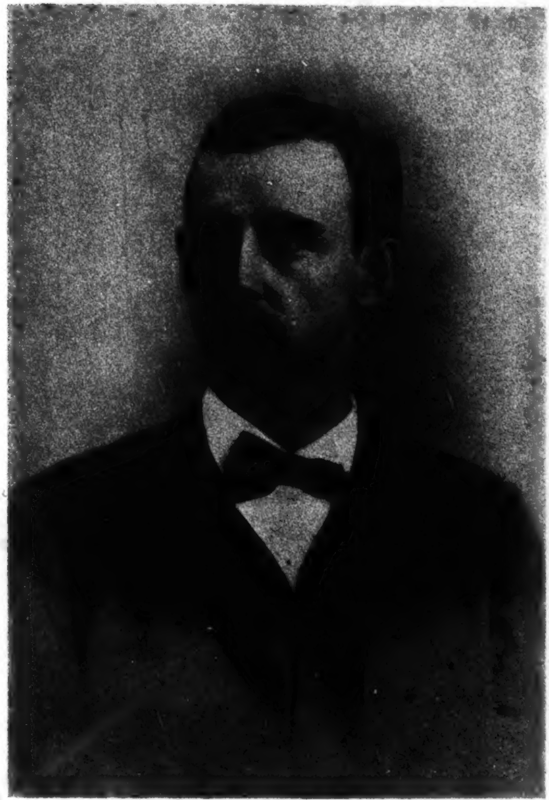
On the return day of the writ the respondent, Sherman Bell, produced the body of the petitioner. At the same time a return to the writ was made, in which the jurisdiction of the court is challenged. The return sets forth the proclamation of the governor, and states that the respondent, having been so ordered by the governor, proceeded to the county of San Miguel with a portion of the national guard of the state; that upon his arrival at the county of San Miguel, he had good reason to believe and did and does in good faith believe, and upon due inquiry in the premises became personally and officially fully satisfied and convinced that the petitioner had been and, if discharged from arrest, would continue to be an active participant in fomenting and keeping alive the said condition of insurrection and rebellion, * * * and was and is a prominent leader of the bands of lawless men engaged in the acts of insurrection and crime mentioned in the proclamation of the governor; and that, in order to accomplish the suppression of said state of insurrection and rebellion, it was and is, in the judgment of said governor and the respondent, absolutely necessary to arrest, detain and for some time to come to restrain the body of the said Charles H. Moyer, in the course of an absolutely necessary step in the matter of suppressing said state of insurrection and rebellion. * * * That the exigencies of the military situation imperatively required the further detention of said Moyer to prevent him from lending aid, comfort, direction, instructions and commands to the said lawless persons.

The reply denies that there exists in the county of San Miguel a state of either insurrection or rebellion, and states that a large number of miners, having been deported from the county, had announced their intention of returning peaceably to their homes, and further announced that to that end they would resist any further interference with their persons and would resist any attempt at their re-deportation; but that their mission in returning was one of peace, and no force whatever would be used by them except in defense of their persons from attack by the mob. That this petitioner has neither been at any time, nor does he now, nor would he continue to be, an active participant either in fomenting or keeping alive any condition of insurrection or rebellion, and that he has at all times conducted himself in strict conformity to the laws of the land, and has advised, in his capacity as president of the Western Federation of Miners, that no active lawlessness should occur upon the part of any member of said Federation, to the end that no reflection might be cast upon said organization.

These facts present for determination the question: Is the petitioner, under the conditions shown to exist, entitled to the privilege of the writ of habeas corpus? If he is detained by due process of law, he is not entitled to a discharge under the writ; if he is not so detained, he is entitled to be discharged. If the privilege of the writ has been suspended by proper authority generally or in his particular case, he is not entitled to be discharged during the period of suspension. The distinction is recognized between the suspension of the privilege of the writ and the right of a military officer to refuse obedience to its commands. Judge Dixon, when chief justice of the Supreme Court of Wisconsin, and during the period of the Civil War, said:

> "I agree that there is a plain distinction between the suspension of the writ in the sense of the clause of the constitution, and the right of a military commander to refuse obedience when justified by the exigencies of war or the ipso facto suspension which takes place when martial law actually exists. * * * But this kind of suspension, which comes with war and exists without proclamation or other act, is limited by the necessities of war. It applies only to cases where the demands upon the officer's time are such that he cannot, consistently with his superior military duty, yield obedience to the mandates of the civil authorities, and to cases arising within districts which are properly subjected to martial law." (*In re* Kemp, 16 Wisconsin, 368.)

The return does not justify the detention of the prisoner upon the ground that the military exigencies are such that the respondent cannot leave his command for the purpose of yielding obedience to the writ. Moreover, it is common knowledge that the commander of the army of the San Miguel, when executive functions did not require his attendance in other parts of the Union, has been at the capital much of the time. The return not showing a state



Robert Wilbur Steele
(From photograph, 1883)

of facts which justifies disobedience of the writ, the petitioner is entitled to his discharge unless the return shows that he is held by due process of law. In the return it is stated that the respondent has been ordered by the executive head of the state to refuse to surrender the petitioner, upon writ of habeas corpus or otherwise; and his counsel contend that the governor, under the constitution, has the power to suspend the privilege of the writ and that in this case he has virtually done so, although no proclamation that he has done so has been made and although he does not expressly say so in the return. If the power to suspend the privilege of the writ is vested in the executive head of the state, it seems to me that it is not important how or in what manner it is exercised. But it is so clear that the power to suspend the privilege of the writ of habeas corpus is not lodged in the executive branch of the government that it seems like a waste of time to discuss the question. If there is any one question positively and finally settled, it is that the power to suspend the privilege of the writ of habeas corpus is solely a legislative power. It is based upon a very simple proposition, which is, that as the privilege of the writ is granted by law, it requires a law to suspend that privilege, and that the executive department cannot legislate. But let us see what the jurists, the statesmen and the text writers have to say upon this subject.

Bollman and Swartout had been arrested at New Orleans by General Wilkinson charged with having been engaged with Burr in a treasonable conspiracy against the United States. They were discharged by the Supreme Court of the United States upon the ground that there was not sufficient evidence to hold them upon the charge of treason. In the course of the opinion in that case, Chief Justice Marshall, in speaking of the power vested in the court to issue the writ of habeas corpus, said:

"If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so. That question depends on political considerations on which the legislature is to decide. Until the legislative will be expressed, this court can only see its duty, and must obey the law." (4 Cranch, 23.)

"Joseph Story, a justice of the Supreme Court, says, in his work on the constitution:

"'It is obvious that cases of a peculiar emergency may arise which may justify—nay, even require—the temporary suspension of any right to the writ. But as it has frequently happened in foreign countries, and even in England, that the writ has, upon various pretexts and occasions, been suspended, whereby persons apprehended upon suspicion have suffered a long imprisonment, sometimes from design, and sometimes because they were forgotten, the right to suspend it is expressly confined to cases of rebellion or invasion, where the public safety may require it: a very just and wholesome restraint, which cuts down at a blow a fruitful means of oppression, capable of being abused in bad times to the worst of purposes. Hitherto no suspension of the writ has ever been authorized by congress since the establishment of the constitution. It would seem, as the power is given to congress to suspend the writ of habeas corpus in cases of rebellion or invasion, that the right to judge whether exigency has arisen must exclusively belong to that body.' (Story on the Constitution, section 1342.)"

General Jackson had declared martial law at New Orleans and had suspended, as a military necessity, the privilege of the writ of habeas corpus. The authority of General Jackson was considered in the case of Johnson vs. Duncan by the Supreme Court of Louisiana. Judge Martin, one of the most learned jurists of his time, after citing the case *ex parte* Bollman, said:

"Again, the power of repealing a law and that of suspending it (which is a practical repeal) are legislative powers. For *eodem modo quo quid constituitur eodem modo de Struitur.*"

Judge Derbigny, in his opinion in the same case, said:

"The constitution of the United States, in which everything necessary to the general and individual security has been foreseen, does not provide that in times of public danger the executive power shall reign to the exclusion of all others. It does not trust into the hands of a dictator the reins of government. The framers of that charter were too well aware of the hazards to which they would have exposed the fate of the republic by such a provision; and had

> they done it, the states would have rejected a constitution stained with a clause so threatening to their liberties. In the meantime, conscious of the necessity of removing all impediments to the exercise of executive power, in cases of rebellion or invasion, they have permitted congress to suspend the privilege of the writ of habeas corpus in those circumstances, if the public safety should require it. Thus far, and no farther, goes the constitution."

And, having quoted from an English author, says further:

> "And can it be asserted that while British subjects are thus secured against oppression in the worst of times, American citizens are left at the mercy of the will of an individual, who may, in certain cases, the necessity of which is to be judged of by himself, assume a supreme, overbearing, unbounded power! The idea is not only repugnant to the principles of any free government, but subversive of the very foundations of our own."

Caleb Cushing, who was nominated by President Grant for chief justice of the United States, said, while he was attorney general of the United States, in an opinion to the secretary of state:

> "And it may be assumed as a general doctrine of constitutional jurisprudence in all the United States, that the power to suspend laws, whether those granting the writ of habeas corpus or any other, is vested exclusively in the legislature of the particular state." (8 Opinions Attorney General, 365.)

In the year 1807 President Jefferson sent to the senate, in confidence, a message detailing the circumstances attending the arrest of persons charged with treason. On the following day Senator Giles, of Virginia, a friend and supporter of the president, moved the appointment of a committee to inquire whether it was expedient, in the condition of public affairs, to suspend the privilege of the writ of habeas corpus. Senator Giles forthwith reported a bill authorizing the suspension of the privilege of the writ for the period of three months, and the bill was immediately passed by the senate and sent to the house in confidence. The house declared, by a vote of 123 to 3, that the message ought not to be kept secret, and a public debate upon the subject occurred. I shall quote from the debate somewhat at length, for the reason that there appears to have been such a unanimity of sentiment on the subject by the statesmen of that period that we should accept their views as a guide for our action.

Mr. Burwell, of Virginia, is reported to have said:

> "He would ask gentlemen if they seriously believed the danger sufficiently great to justify the suspension of this most important right of the citizen, to proclaim the country in peril and to adopt the measure so pregnant with mischief by which the innocent and guilty will be involved in one common destruction? He said this was not the first instance of the kind since the formation of the federal government; there had been already two insurrections in the United States, both of which had defied the authority of congress and menaced the Union with dissolution. Notwithstanding one of them justified the calling out of 15,000 men and the expenditure of 1,000,000 of dollars, he had not heard of a proposition to suspend the writ of habeas corpus. What, then, will be said of us, if now, when the danger is over, firm in the attachment of the people to the Union, with ample resources to encounter any difficulty which may occur, we resort to a measure so harsh in its nature, oppressive in its operation and ruinous as a precedent? * * * Nothing but the most imperious necessity would excuse us in confiding to the executive, or any person under him, the power of seizing and confining a citizen, upon bare suspicion, for three months, without responsibility, for the abuse of such unlimited discretion. * * * The people of the United States would have just reason to reproach their representatives with wantonly sacrificing their dearest interests when, from the facts presented to this house, it seems the country was perfectly safe and the conspiracy nearly annihilated. Under these circumstances, there can be no apology for suspending the privilege of the writ of habeas corpus and violating the constitution, which declares, 'The writ of habeas corpus shall not be suspended, unless when, in cases of invasion or rebellion, * * *' What, in another point of light, would be the effect of passing such a law? Would it not establish a dangerous precedent? A corrupt and vicious administration, under the sanction and example of this law, might harass and destroy the best men of the country. It would only be necessary to excite artificial commotions, circulate exaggerated rumors of danger, and then follows the repetition of this law by which every obnoxious person, however honest, is surrendered to the vindictive resentment of the government. It will not be a sufficient answer that this power will not be abused by the president of the United States. He, Mr. B. believed, would not abuse it, but it would be impossible to restrain all those who are under him. Besides, he would not consent to advocate a principle bad in itself because it will not, probably, be abused."

Mr. Elliott, of Vermont, said:

"It is, indeed, difficult for me, consistently with the sincere and high respect which I entertain for the source from whence this measure originated, to express, in decorous terms, the hostility which I feel to the proposition. I am, therefore, disposed to consider it as an original proposition here; as a motion in this body to suspend, for a limited time, the privileges attached to the writ of habeas corpus. And, in this point of view, I am prepared to say that it is the most extraordinary proposition that has ever been presented for our consideration and adoption. Sir, what is the language of our constitution upon this subject? 'The privilege of the writ of habeas corpus shall not be suspended, except when, in cases of invasion or rebellion, the public safety shall require it.' Have we a right to suspend it in any and every case of invasion and rebellion? So far from it, that we are under a constitutional interdiction to act, unless the existing invasion or rebellion, in our sober judgment, threatens the first principles of the national compact, and the constitution itself. In other words, we can only act in this case with a view to national self-preservation. We can suspend the writ of habeas corpus only in a case of extreme emergency; that alone is *salus populi* which will justify this *lex suprema*. And is this a crisis of such awful moment? Is it necessary at this time, to constitute a dictatorship to save the people from themselves, and to take care that the republic shall receive no detriment? What is the proposition? To create a single dictator, as in ancient Rome, in whom all power shall be vested for a time? No; to create one great dictator and a multitude, an army of subaltern and petty despots; to invest, not only the president of the United States, but the governors of states and territories, and, indeed, all persons deriving civil or military authority from the supreme executive, with unlimited and irresponsible power over the personal liberty of your citizens. * * * An eminent English author, and the most popular writer upon the subjects of legal science, considers its suspension as the suspension of liberty itself; declares that the measure ought never to be resorted to but in cases of extreme emergency, and says that the nation then parts with its freedom for a short and limited time, only to resume and secure it forever. Hence, he compares the suspension of the habeas corpus act in Great Britain to the dictatorship of the Roman republic."

Mr. Eppes said:

"By this bill we are called upon to exercise one of the most important powers vested in congress by the constitution of the United States. A power which suspends the personal rights of your citizens, which places their liberty wholly under the will, not of the executive magistrate only, but of his inferior officers. Of the importance of this power, of the caution which ought to be employed in its exercise, the words of the constitution afford irresistible evidence. * * * Well, indeed, may this caution have been used as to the exercise of this important power. It is, in a free country, the most tremendous power which can be placed in the hands of a legislative body. It suspends, at once, the chartered rights of the community, and places even those who pass the act under military despotism. The constitution, however, having vested this power in congress and a branch of the legislature having thought its exercise necessary, it remains for us to inquire whether the present situation of our country authorizes, on our part, a resort to this extraordinary measure. * * * This government has now been in operation thirty years; during this whole period, our political charter, whatever it may have sustained, has never been suspended. Never, under this government, has personal liberty been held at the will of a single individual. Shall we, sir, suspend the chartered rights of the community for the suppression of a few desperadoes? * * * I consider the provisions in the constitution for suspending the habeas corpus as designed only for occasions of great national danger."

Mr. Nelson said:

"This precedent, let me tell, gentlemen, may be ruinous, may be a most damnable precedent—a precedent which, hereafter, may be most flagrantly abused. The executive may wish to make use of more energetic measures than the established laws of the land enable him to do; he will resort to this as a precedent, and this important privilege will be suspended at the smallest appearance of danger. The effect will be that, whenever a man is at the head of our affairs who wishes to oppress or wreak his vengeance on those who are opposed to him, he will fly to this as a precedent. It will truly be a precedent fraught with the greatest danger; a precedent which ought not to be set except in a case of the greatest necessity; indeed, I can hardly contemplate a case in which, in my opinion, it can be necessary."

Mr. Randolph said:

"If the bill passes, we are told, it will be but temporary. * * * As to the three months' continuance, I consider that as one of the most objectionable features of the bill—as a bait to the trap—as the entering wedge. If it is made reconcilable to the interests and feelings of this house to pass it for three months, do you think we will feel the same lively repugnance to it that we do now? No! It has been truly said that no man becomes perfectly wicked at once; and it may be affirmed, with equal truth, that a nation is never enslaved at once. Men must be initiated by degrees, and their repugnance must be gradually overcome."

Mr. Smilie said:

"I consider this one of the most important subjects upon which we have been called to act. It is a question which is neither more nor less than whether we shall exercise the only power with which we are clothed to repeal an important part of the constitution. It is in this case only that we have power to repeal that instrument. A suspension of the privilege of the writ of habeas corpus is, in all respects, equivalent to repealing that essential part of the constitution which secures that principle which has been called, in the country where it originated, the 'palladium of personal liberty.' If we recur to England, we shall find that the writ of habeas corpus in that country has been frequently suspended. But, under what circumstances? We find it was suspended in the year 1715. But what was the situation of the country at that time? It was invaded by the son of James II. There was a rebellion within the kingdom, and an army was organized. The same thing happened in the year 1745. On this occasion it was found necessary to suspend it. In later times, when the government had grown more corrupt, we have seen it suspended for an infinitely less cause. We have taken from the statute book of this country this most valuable part of our constitution. The convention which framed that instrument, believing that there might be cases when it would be necessary to vest a discretionary power in the executive, have constituted the legislature the judge of this necessity, and the only question now to be determined is, does this necessity exist?"

Mr. Dana said:

"I have been accustomed to view the privilege of the writ of habeas corpus as the most glorious invention of man. * * * There is another principle which appears to me highly objectionable. It authorizes the arrest of persons, not merely by the president or other high officers, but by any person acting under him. I imagine this to be wholly without precedent. If treason were marching to force us from our seats, I would not agree to do this. I would not agree thus to destroy the fundamental principles of the constitution or to commit such an act either of despotism or pusillanimity. Under this view of the subject, I am disposed to reject the bill as containing a proposition on which I cannot deliberate." (Annals of Congress, Ninth Congress, Second Session, pp. 402-424.)

And the house of representatives, by a vote of 113 to 19, refused to refer this bill to a committee, but, upon first reading thereof, indefinitely postponed it; and of the 19 members who voted against the motion, very many were opposed to the bill.

In February following, another debate occurred, at which time Mr. Broom, of Delaware, is reported to have said:

"In ordinary times the laws which already exist may be sufficient, for in such times there is no temptation to transgress the limits of constitutional or legal privileges; but in times of turbulence and commotion the mere formal recognition of rights will afford too feeble a barrier against the inflamed passions of men in power, whether excited by an intemperate zeal for the supposed welfare of the country, or by the detestable motives of party rancor or individual oppression. I could have wished that circumstances had never occurred which would make it necessary to fortify, by penal laws, the constitutional privilege of habeas corpus, and that the whole nation, from the first to the least, had regarded it with such religious veneration that no officer, either military or civil, would have dared to violate it. But recent circumstances have proved that such a wish would have been in vain, and have demonstrated, more powerfully than any abstract reasoning, the necessity and importance of further legislative provision.

"This privilege of the writ of habeas corpus has been deemed so important that, by the ninth section of the first article of the constitution, it is declared that it shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it. Such is the value of this privilege that even the highest legislative body of the Union—the legitimate representatives of the nation—are not entrusted with the guardianship of it, or suffered to lay their hands upon it unless when, in cases of extreme danger, the public safety shall make it necessary. The suspension of this privilege upon slight pretenses, it was easily foreseen, would destroy its efficacy, and if it depended on the mere will of congress it would become, in the hands of the majority, the most certain and convenient means to accomplish the purposes of party persecution or to gratify political or personal rancor or animosity. * * *

"In England this inestimable privilege has been for ages the proud theme of exultation. There they worshipped it as a talismanic wand which could unbar the gates of the strongest prison and dissolve in an instant the fetters of the captive. It was to Englishmen as a wall of fire by night, shielding them from the arbitrary sway of tyrannic power. * * *

"Yet, however important these rights may be, a few moments' reflection will satisfy us that, without the writ of habeas corpus, they could avail but little. The rights may exist as abstract rights, but the writ of habeas corpus affords the most important, if not the only means of exercising them. In vain does the law proclaim that no man shall be imprisoned contrary to law, if a party has no access to a tribunal to decide the question of legality. In vain does the law promise a trial by peers if the imprisoned party can have no access to a tribunal where he may demand such trial. In short, without the writ of habeas corpus, rights of personal liberty, however solemnly proclaimed, would exist but in name. This writ of habeas corpus is coeval with the rights which it secures. It existed by force of the common law until the subtleties of lawyers had nearly refined it away, when it was aided by the statute of Charles, and has since been found fully adequate to produce the desired effect. If, then, this privilege has been productive of the most salutary effects in England in guarding the liberty of the subject, we have the strongest proof that we can require of its importance to us except our own experience. It is true we live under a form of government where the sovereignty is acknowledged to belong to the people, but let us not vainly imagine that we have no necessity for laws restrictive upon men in power. Under the fair semblance of republicanism has often been practised the most detestable tyranny, and the mild laws of a republic have too often afforded a shelter for knaves and tyrants, instead of a shield for the virtuous and oppressed. * * *

"For my own part, I wish to live under a government of laws, and not of men; for, however pure and upright be the intentions of our military commanders, however virtuous and even unsuspected be their conduct, I can never agree that my right of personal liberty shall depend upon their forbearance and discretion. I know not whether these men that have been arrested are innocent or guilty of the treason with which they are charged, but, whether innocent or guilty, they must be arrested and tried according to law. However atrocious the crime which has been committed, the punishment must be according to law. For, in transgressing the limits of the law to revenge upon a criminal the wrongs of society, we are guilty of injustice both to society and the criminal."

And Mr. Randolph said:

"I make no profession of sympathy for the men who have been denounced as traitors. I argue on the supposition that they are traitors. There is no need of much exertion on behalf of good men. Attacks on the liberty of the people are, as has been stated before, made always in the persons of the vile and worthless. But when precedent is once established, in the case of bad men, who, like pioneers, go before to smooth the way, good men tremble for their safety. * * *"

Mr. Randolph concluded by begging pardon for detaining the house so long, but he could never be indifferent on a subject like this. The house were now to decide if the constitution were only pen, ink and paper, and to be set aside at the whim of every military commander, or whether it were unalterable by fate, and if he who dared to violate it should rue the consequences. (Annals of Congress, Ninth Congress, Second Session, 502-538.)

Accompanying the message of the president was a letter from General Wilkinson in which he stated that he had delivered one person over on habeas corpus, but that he had evaded the writ as to the other two and, recognizing that he had violated the law, said that he should look to congress for indemnity. A day or two later the president sent a second message to congress in which he stated that the persons arrested at New Orleans had arrived at the seat of government and that, immediately upon their arrival, he had delivered to the proper authorities all evidence in his possession and had directed that proceedings be instituted against them at once.

This debate should be very instructive. It was participated in by members from nearly every state, and being at a time so early in our history, should be regarded as contemporaneous with the constitution. The congress, composed as it was of the ablest men of the times, would not consent to the proposition of suspending the writ of habeas corpus for the period of three months, on the ground that it would create not only a dictator in the person of the president, but a horde of petty tyrants through the country, and because the necessity for so doing was not so great and imperious as to justify them in taking that course. From the debate we learn that at no time before had the privilege of the writ been suspended; that, in the opinion of the members of this congress, the general of the army had violated the law in not turning over to the civil authorities those engaged in rebellion against the government; that the writ should not be suspended by congress except the nation itself was in danger; and that, unless the privilege of the writ was suspended, the military could not arrest and hold citizens on suspicion.

During the period of the Civil War, John Merryman was arrested by military authority upon vague and indefinite charges, without any proof so far as it appeared. When a writ of habeas corpus was served requiring the officer to produce the body before the chief justice of the United States, in order that inquiry might be made as to the legality of the imprisonment, the officer answered that he had been authorized by the president to suspend the writ of habeas corpus and on that ground refused obedience to the writ. The constitution of the United States contains this provision:

"The privilege of the writ of habeas corpus shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it."

In the constitution of our state the following provision is found:

"*That* the privilege of the writ of habeas corpus shall *never* be suspended unless when, in *case* of rebellion or invasion, the public safety may require it."

The slight difference between the federal and our state constitution is shown by the italics. The provision is found in our bill of rights, and the conjunction "that" connects the opening sentence, which is: "In order to assert our rights, acknowledge our duties, and proclaim the principles upon which our government is founded, we declare:" The adverb "not" of the federal law is replaced by the more positive adverb "never" in ours, and the plural of the noun "case" is used in the national constitution, while in ours the singular appears. Otherwise the sections are identical.

In construing this section of the federal constitution the chief justice of the United States held that the power of suspending the privilege of the writ was solely a legislative power. He quoted from Blackstone, Hallam, Marshall and Story; related the incident occurring in the administration of Jefferson; reviewed the history of the struggles of the English speaking people which ended in the enactment of the thirty-first chapter of Charles II—an act, as he declared, of great and inestimable value, because it contains provisions which compel courts and judges and all parties concerned to perform their duties in a manner specified in the statute; and closes by saying:

> "I can only say that if the authority which the constitution has confided to the judiciary department and judicial officers may thus, upon any pretext or under any circumstances, be usurped by the military power at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army

officer in whose military district he may happen to be found." (Taney's Circuit Court Decisions, 246.)

The decision of the chief justice was assailed by many able lawyers of the time, and the chief justice was himself denounced as a sympathizer with the rebellion; yet, notwithstanding the great esteem in which the president was held by the people of the North—notwithstanding the fact that the life of the republic was in danger—loyal courts all over the North sustained the chief justice and decided that the executive had not the power under the constitution to suspend the privilege of the writ. And finally, in 1863, the question was settled. Thaddeus Stevens, the leader of the Union party, succeeded in passing through the house of representatives a bill authorizing the president to suspend the privilege of the writ of habeas corpus, and to indemnify him or other officers in cases where damages were awarded for arbitrary arrest. The senate amended the bill and, after a conference between the two houses, it became a law. Thus the executive and legislative branches of the government recognized the principles contended for by the judicial department, and it is settled that congress only has the power of suspending the privilege of the writ of habeas corpus, and that it is the sole judge of the conditions which require its suspension.

The language employed is so peculiarly applicable to the case at bar that I shall quote from some of the opinions of those judges who announced that the power to suspend the writ is legislative and not executive. In the case *Ex parte* Benedict (Federal Cases, 1292), Judge Hall, of the United States Court for the northern district of New York, held that the president of the United States is not vested with power to suspend the privilege of the writ of habeas corpus at any time without the authority of an act of congress. In the course of the opinion he said:

"Even in the midst of our present struggle we should not forget the teachings and history of the past and regard as trivial and unimportant constitutional principles, the persistent violation of which led to the dethronement of kings and the overthrow of long established forms of government. We should not forget the letters *de cachet* of the French monarchs, nor the illegal imprisonments under Charles I. In our efforts to read aright and profit by the terrible lesson which the present condition of our unhappy country presents, we should not forget what Hume and Hallam and Blackstone and Marshall and Story and Kent taught us."

Quoting from Blackstone, he says:

"'Of great importance to the public is the preservation of this personal liberty; for, if once it were left to the power of any—of the highest magistrate—to imprison whomever he or his officers thought proper (as in France it is daily practiced by the crown), there would soon be an end of all other rights and immunities. Some have thought that unjust attacks, even upon life and property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole kingdom; but confinement of the person by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. And yet sometimes, when a state is in danger, even this may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great as to render this measure expedient; for it is the parliament only, or legislative power, that, whenever it sees proper, can authorize the crown, by suspending the habeas corpus act for a short and limited time, to imprison suspected persons without giving any reason for so doing, as the senate of Rome was wont to have recourse to a dictator, a magistrate of absolute authority, when they judged the republic in any imminent danger.'"

Judge Hall then speaks of the opinion of Attorney General Bates, whose views have been adopted in large measure by this court:

"For that gentleman I entertain the highest respect. His purity of motive and character, his great legal acquirements and his undoubted patriotism and ability are unquestioned; but, even in these respects, that excellent gentleman would not want his friend to claim more than that he was the equal of the learned chief justice of the United States. Placing their opinions upon the same footing, they would only neutralize each other, and then the deliberate opinions of Marshall and Story and Martin and other justices of the Supreme Court who concurred in the opinion of their chief in the case of *Ex parte* Bollman (4 Cranch, 75), supported, as they are, by unanswerable argument, are decisive of the question, and constrain me to decide that the president, without the authority of congress, has no constitutional power to suspend the privilege of the writ of habeas corpus in the United States."

And Judge Hall ordered the discharge of the prisoner.

In the case *In re* Kemp (16 Wis., p. 382), Chief Justice Dixon said:

> "I think the president has no power, in the sense of the ninth section of the first article of the constitution of the United States, to suspend the privilege of the writ of habeas corpus. It is, in my judgment, a legislative and not an executive act; and the power is vested in congress. Upon this question it seems to me that the reasoning of Chief Justice Taney, in *Ex parte* Merryman, is unanswerable."

And Justice Cole, in the same case, said:

> "To suspend, annul or take away a right given by law is, under our system of government, essentially a legislative function. To deprive a citizen of the privilege of the writ of habeas corpus is to take from him one of the highest and most sacred rights secured to him by the constitution and laws of the land. It is a change of the law which, from the nature of things, belongs to the power which can make the law."

Justice Paine, in answering the question, "Where is the power to suspend the writ lodged?" said:

> "From its very nature it would not naturally be entrusted to a single man, and that man at the head of the military. It is a power dangerous anywhere. It delivers over the nation, for the time being, to the control of the executive. It makes him substantially what the Roman dictator was. No single officer should be allowed to assume such powers upon his own judgment only. The nation that is to be subjected to them should have some voice in determining when the necessity arises for their existence. And as in Rome there was no officer who could assume the power of the dictator upon his own judgment, but such officer had to be appointed by a vote of the senate, so here the power to suspend the writ of habeas corpus would naturally have been entrusted to the legislature, and not to the executive alone. There the constitution has placed it. So the Supreme Court of the United States has declared. So it has been held by every judicial decision, and every elementary writer on constitutional law."

In Griffin vs. Wilcox (21 Ind., 270) and Warren vs. Paul (22 Ind., 276), the Supreme Court of Indiana said that the section of the constitution authorizing the suspension of the writ of habeas corpus, in case of invasion or rebellion, was a delegation of power to the legislature, and not to the executive authority.

In the Circuit Court of the United States for the district of California, and in the case of McCall vs. McDowell, Judge Deady, delivering the opinion, said, with reference to the power of the president to suspend the writ of habeas corpus:

> "I do not propose to argue the question. There are some things too plain for argument, and one of these is that by the constitution of the United States the president has not the power to suspend the privilege of the writ, and that congress has. The power of the president is executive power—a power to execute the laws, but not to suspend them. The latter is a legislative function, and so far as it exists, belongs naturally and by force of the constitution exclusively to congress." (I Abbott's U. S. Rep., 212.)

A motion for a new trial was argued before Justice Field, of the United States Supreme Court, and Judge Hoffman, and was denied.

In re Moore (64 N. C., 802), the chief justice says:

> "I declare my opinion to be, that the privilege of the writ of habeas corpus has not been suspended by the action of his excellency; that the governor has the power, under the constitution and laws, to declare a county to be in a state of insurrection, to take military possession, to order the arrest of all suspected persons, and to do all things necessary to suppress the insurrection, but he has no power to disobey the writ of habeas corpus, or to order the trial of any citizen otherwise than by jury. * * * It may be that the arrest and also the detention of the prisoner is necessary as a means to suppress the insurrection. But I cannot yield my assent to the conclusion; the means must be proper, as well as necessary, and the detention of the prisoner as a military prisoner is not a proper means, for it violates the Declaration of Rights: 'The privilege of the writ of habeas corpus shall not be suspended.' (Constitution, article 1, section 21.)
>
> "This is an express provision and there is no rule of construction or principle of constitutional law by which an express provision can be abrogated and made of no force by an implication from any other provision of the instrument."

Upon the subject of martial law the authorities do not appear to be divided. In nearly every case I have cited the question of the right of the president to declare a community to be under martial law was under consideration. In the case Johnson vs. Duncan, decided in the year 1815, the Supreme Court of Louisiana decided that the military commander had no authority to declare and enforce martial law, and that his act in so doing was illegal and void. In a note to the case is the following:

> "The doctrine established in the first part of the opinion of the court in the above case is corroborated by the decision of the District Court of the United States for the Louisiana district in the case of The United States vs. Jackson, in which the defendant, having acted in opposition to it, was fined $1,000. In Lamb's case, Judge Bay, of South Carolina, recognized the definition of martial law given by this court, expressing himself thus: 'If by martial law is to be understood that dreadful system, the law of arms, which, in former times, was exercised by the king of England and his lieutenants, when his word was the law, and his will the power by which it was exercised, I have no hesitation in saying that such a monster could not exist in this land of liberty and freedom. The political atmosphere of America would destroy it in embryo. It was against such a tyrannical monster that we triumphed in our revolutionary conflict. Our fathers sealed the contest by their blood, and their posterity will never permit it to tarnish our soil by its unhallowed feet, or harrow up the feelings of our gallant sons by its ghastly appearance. All our civil institutions forbid it, and the manly hearts of our countrymen are steeled against it.'"

This case was reported in the year 1816. But the case, above all others, which settles, until reversed, the question of the powers of the military, is that of *ex parte* Milligan (4 Wall, 2). The case involved the right of a military commission to try a citizen of the state of Indiana under the act of congress referred to herein. The opinion was written by David Davis, the associate, the friend, the appointee of Lincoln. It is so logical, so patriotic and so convincing that I cannot conceive of a condition or change of thought that will cause its reversal; and it should, in my opinion, be a guide for all courts—a sure and safe guide—which, if followed, will protect the citizen and enforce the law. Judge Davis said, speaking of the bill of rights:

> "These securities for personal liberty thus embodied were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime, and so strong was the sense of the country of their importance and so jealous were the people that these rights, highly prized, might be denied them by implication, that when the original constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, it would never have been ratified. Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise when rulers and people would become restive under restraint and seek by sharp and decisive measures to accomplish ends deemed just and proper and that the principles of constitutional liberty would be imperiled unless established by irrepealable law. The history of the world had taught them what was done in the past might be attempted in the future. The constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority. * * *
>
> "It follows from what has been said on this subject that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theater of active military operations, where war prevails, there is a necessity to furnish a substitute for the civil authority thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open and in the proper, unobstructed exercise of their jurisdiction."

In another place Judge Davis says:

> "It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is

this: That in the time of war the commander of an armed force (if, in his opinion, the exigencies of the country demand it, and of which he is to judge) has the power, within the lines of his military district, to suspend all civil rights and their remedies and subject citizens as well as soldiers to the rule of his will, and in the exercise of his lawful authority cannot be restrained except by his superior officer or the president of the United States. If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules. The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law established on such a basis destroys every guarantee of the constitution, and effectually renders the 'military independent of and superior to the civil power'—the attempt to do which by the king of Great Britain was deemed by our fathers such an offense that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish. * * * Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right be conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency they would have been false to the trust reposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war. How often or how long continued human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this and other equally weighty reasons, they secured the inheritance they had fought to maintain by incorporating in a written constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the president, or congress, or the judiciary disturb, except the one concerning the writ of habeas corpus. * * *

"The illustrious men who framed that instrument were guarding the foundations of civil liberty against the abuse of unlimited power; they were full of wisdom and the lessons of history informed them that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. Knowing this, they limited the suspension to one great right, and left the rest to remain forever inviolable. But, it is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it could well be said that a country preserved at the sacrifice of the cardinal principles of liberty is not worth the cost of preservation. Happily it is not so."

It seems to me that everything has been said that can be said, and that the expounders of the constitution have laid out a path that leads to peace and security. And I have quoted from these authorities for the purpose of demonstrating that the civil liberty of these great men and the civil liberty of Colorado today are of different species.

But it is said that the governor has greater powers under our constitution than the president has under the national constitution; that because he is given power to suppress insurrection and repel invasion, power sufficient to accomplish the purpose is necessarily implied; that the executive is the sole judge of the means to be employed and that the bill of rights must give way when the governor is engaged in exercising this power. It was because of the fear that the guarantees of personal liberty would be denied by implication that the bill of rights was made a part of our constitution, and it was the intention of the people when they adopted the constitution to declare their rights in such plain English that they could not be construed away nor frittered away by implication or evasion. The authority is overwhelming that the position of the governor cannot be sustained; that the power of suspending the writ of habeas corpus is legislative and not executive; that martial law can only prevail in places where the civil law is overthrown by force, and that it exists only so long as it is necessary to reinstate the courts; that martial law cannot prevail where the courts are open and exercising their functions; that the judicial department will take notice whether the courts are open or have been overthrown by superior force. This court has not undertaken to declare that the position taken by the governor and his special counsel is correct, but has said that the right of the governor to declare and enforce martial law and to suspend the privilege of the writ of habeas corpus is not involved. The court would have sustained the governor, under the authorities, if it were possible to do so; but, finding it impossible to sustain him under the authorities, it has sustained him in spite of them. All courts are in duty bound to sustain the co-ordinate departments of the government when they can be sustained; and I should sustain the executive department if any doubt lingered in my mind as to the right of the head of that department to exercise the great power that he asserts. But I believe that the constitution has been "unnecessarily assailed and rudely violated" by the head of the executive department, and I further believe that this court has removed the landmarks which our fathers have set; and my duty requires me to withhold my approval.

This leads us to a discussion of the opinion in the case. The holding of the court that the respondent is not required to deny the allegations of the petition but to answer to the writ, which requires him to show by what authority he detains the prisoner, I do not regard as very important, in view of the disposition made of the case. The chief justice of the United States in the Merryman case appears to have considered the averments of the petition in deciding the case; and I shall, for the purposes of this, consider one or two facts stated in the petition which I think have a bearing upon the case. The petitioner was not in the county of San Miguel at the time it was declared to be in a state of insurrection and rebellion. He did not go to the county of San Miguel voluntarily, but was taken there by the sheriff upon a warrant charging him with a misdemeanor. The petition alleges that the charge was unfounded, and that it was made and the warrant issued for the purpose of taking him to the county of San Miguel to enable the military authorities to detain him. He was allowed bail, but was, on the following day, arrested by the military officers. If it be true that such acts were committed in this case—and we are precluded from making an investigation of the facts, then any person in any part of the state can be carried into the county where it is alleged an insurrection exists and kept there without bail until the commanding officer chooses to release him. This was done in Illinois by the federal officers, and the legality of the arrest was passed upon by the Supreme Court of that state in the case of Johnson vs. Jones (44 Ill., 143). The court said:

"It is a fearful power that is claimed for the government by the counsel for the appellee, and one which no free government ought to possess. Even in England, in the latter part of the last century, when secret political societies were formed hostile to the government and in league with the French revolutionists or supposed to be so, although the country was at war with France, yet, while the high Tory administration of Mr. Pitt arrested, prosecuted and punished with a pitiless vigor, it acted only through the ordinary agencies of the civil courts, and made no use of the military arm under the pretense that the offending persons were belligerents or public enemies. If this plaintiff was guilty of the charges made in the plea he merited arrest and a severe punishment, but he should have been punished in conformity to law. It is to be remembered that the question before us is one of power, simply, on the part of the executive, and not of deserving on the part of the plaintiff. If the president could rightfully arrest him by military force and confine him without process or trial to a fortress in the harbor of New York, he could do the same thing to any other person in the state of Illinois, however innocent of crime. * * * As no charge is made, no judicial investigation had, it is left entirely to the caprice of the government to determine what persons shall be seized. The power to thus arrest being once conceded, every man in the state * * * would hold his liberty at the mercy of the military officer in command."

In a separate opinion by Justice Breese, it is said:

"I cordially concur in the sentiment that the constitution of the United States was designed by its framers, and has been hitherto so understood by the people, to be the same protecting instrument in war as in peace; that a state of war does not enlarge the powers of any one department of the government established by it, nor has any one of these departments any right to urge 'necessity' or 'extraordinary emergencies' as a plea for the usurpation of powers not granted. The first is the tyrant's plea, and the other places the dearest rights of the citizen at the mercy of a dominant party, who have only to declare the 'emergency,' which they can readily create, pretexts for which bad men are keen to find and eager to act upon."

And the marshal who made the arrest was held liable for damages. And so it seems to me that when one alleges that he is not an insurgent, that he was not in the county where the insurrection was alleged to exist, but that he was carried there by force for the purpose of being placed in the custody of military authorities—conceding everything in the opinion to be a correct statement of the law—there is power in the civil authority to examine the question and determine whether the petitioner is in fact guilty.

It is held by the court that as the governor, under the constitution, is empowered to suppress insurrection or repel invasion, that the recitals in his proclamation that an insurrection exists cannot be controverted because it becomes his duty to determine as a fact when a condition exists that demands the exercise of his power, and that the judicial department cannot substitute its judgment for that of the executive department in matters calling for the exercise of discretion. As I have before stated, I do not regard the proclamation as of great importance. It does not seem to me to be necessary to proclaim an insurrection before undertaking to suppress it, and I am satisfied that the proclamation is not a condition precedent to the exercise of the power. An insurrection may or may not exist, notwithstanding the proclamation of the governor; as an insurrection may continue long after the governor declares it to have been suppressed, so it may cease long before his declaration of peace. The proclamation may determine the status of the militia, and may be necessary for the purpose of ordering them to the scene of insurrection; and the governor has, in my opinion, the undoubted power to call out the militia at such time to enforce such laws as in his judgment are proper for the protection of persons and property; and it is entirely probable that the act of the governor in calling to his aid the military arm of the government cannot be questioned, but when it comes to superseding the civil power and exercising martial law, to disobeying the writ of habeas corpus or other process of the court, to detaining citizens upon suspicion, then the question of whether an insurrection exists is not to be determined by the governor's proclamation. If such is not the law, then, as Justice Breese says, it "places the dearest rights of the citizen at the mercy of the dominant party, who have only to declare the 'emergency,' which they can readily create, pretext for which bad men are keen to find and eager to act upon."

I therefore do not assent to the doctrine announced.

The doctrine announced in the other parts of the opinion I regard as establishing a more dangerous precedent, of more far-reaching consequences, if possible, than the preceding one. And, in order to properly discuss that branch of the case, we should keep constantly before us the words of the Supreme Court of the United States:

> "The constitution * * * is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false." (4 Wall, 2.)

The court then, as prefatory to a discussion of questions involving various provisions of the constitution, says that "Laws must be given a reasonable construction which, so far as possible, will enable the end thereby sought to be attained. So with the constitution."

The sentence is rather obscure. If the court means that it will not be presumed that the legislature intends what is unreasonable, then I agree with it; but if it means that the dearest right preserved by our constitution—freedom from arbitrary arrest and imprisonment—can be argued away, as impliedly repealed by the authority given to the governor to execute the laws and suppress insurrection, I do not agree with it. The court has not construed the constitution—it has ignored it; and the result is that it has made greater inroads on the constitution than it intended, and that not one of the guarantees of personal liberty can now be enforced. The Supreme Court of the United States, speaking of the bill of rights, says:

> "So jealous were the people that these rights, highly prized, might be denied them by implication, that when the original constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, it would never have been ratified. Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided."

The court then proceeds to give to the constitution what it terms a reasonable construction. After declaring that the petitioner can be restrained of his liberty without warrant and on suspicion only, until such time as the military authority declares the insurrection at an end, it says:

> "Nor do these views conflict with section 22 of the bill of rights, which provides that the military shall always be in strict subordination to the civil power. The governor, in employing the militia to suppress an insurrection, is merely acting in his capacity as the chief civil magistrate of the state, and, although exercising his authority conferred by the law through the aid of the military under his command, he is but acting in a civil capacity. In other words, he is but exercising the civil power vested in him by law through a particular means which the state has provided for the protection of its citizens."

This was the argument advanced by Attorney General Bates, more than forty years ago, but it has not found its way into the reported decisions of the courts. When the court says that because the governor is the head of the executive department of the state, when he takes command of the military forces he is still at the head of the civil power, and that the section of the bill of rights that declares "that the military shall always be in strict subordination to the civil power" has no other meaning than that the military shall always be under the command of the governor, it is simply annulling that section of the bill of rights. The section referred to must have some meaning. It can have no meaning if it is construed as the court construes it. I think it has a meaning. The language used is not obscure or ambiguous. It undoubtedly means that the civil power shall control at all times, in war and in peace. The Supreme Court of the United States has said that the attempt to make the military independent of, and superior to, the civil power by the king of Great Britain was deemed by our fathers such an offense that they assigned it to the world as one of the causes which impelled them to declare their independence. (4 Wall, 2.)

Again, the court says:

> "To deny the right of the militia to detain those whom they arrest while engaged in suppressing acts of violence and until order is restored would lead to the most absurd results."

This sentence inflicts a fatal wound upon civil liberty, suspends indefinitely the privilege of the writ of habeas corpus, annuls that section of the constitution which declares that no person shall be deprived of liberty without due process of law, and characterizes the declaration of the Supreme Court of the United States as an absurdity. I say this because the opinion declares that the governor is the sole judge of the conditions which impel him to call forth the militia and to withdraw it, and of the necessity to imprison and detain; and this without regard to the guilt or innocence of the person imprisoned. This was the doctrine the Supreme Court had in mind when it declared: "No doctrine involving more pernicious consequences was ever invented by the wit of man."

A Union congress declined to invest the beloved Lincoln with such enormous power, and, although it authorized the suspension of the privilege of habeas corpus, it declared the superiority of the civil power by requiring the release of prisoners unless indictment was returned within a limited time.

Again, the court says:

> "If, as contended by counsel for petitioner, the military, as soon as a rioter or insurrectionist is arrested, must turn him over to the civil authorities of the county, the arrest might, and in many instances would, amount to a mere farce. He could be released on bail and left free to again join the rioters or engage in aiding and abetting their action, and if again arrested, the same process would have to be repeated, and thus the action of the military would be rendered a nullity."

Expressed otherwise, the statement is that we should deny the prisoner one constitutional right because, unless we do, he may take advantage of another. Is it the law of this land that one who has committed a bailable offense shall not be admitted to bail because he may repeat the offense? I think not—I know it is not.

Again, the court says:

> "The arrest and detention of an insurrectionist either actually engaged in acts of violence or in aiding and abetting others to commit such acts, violates none of his constitutional rights. He is not tried by any military court, or denied the right of trial by jury; neither is he punished for violation of law, nor held without due process of law. His arrest and detention in such circumstances are merely to prevent him from taking part or aiding a continuation of the conditions which the governor, in the discharge of his official duties and in the exercise of the authority conferred by law, is endeavoring to suppress."

I know of no authority that vests in the governor the power to arrest one who he may think will commit an offense. No such power is granted by the constitution nor bestowed by statute. The courts of the state are open and in the unobstructed performance of their functions. Most persons would regard restraint of liberty for the period of nearly ninety days as a punishment; and when the court says that the petitioner, by his detention, loses none of his constitutional rights, it ignores, it seems to me, that section of the constitution which provides that no person shall be deprived of his liberty without due process of law. For, suppose it should transpire that the petitioner is not guilty of any offense, would not his imprisonment without charge and for the purpose of preventing him from committing an offense be an injustice? The court has presumed that this man is an insurgent; the presumption of law is that he is innocent. He asserts that he is not guilty, and no one has charged that he is guilty. The only statement made which in any way implicates him is that of the adjutant general, who says that he became convinced by inquiry that he was the leader of a band of lawless men. Moyer may be guilty of the most heinous offenses. It may be that he deserves to linger in prison the remainder of his natural life. But he is entitled to his liberty unless some one in proper form and before a proper tribunal charges him with violation of the law. But the court says he is held by due process of law. Whatever war power the governor may have, this power is not due process of law. Justice Paine, of the Supreme Court of Wisconsin, in the case *In re* Kemp (16 Wis., 419), says:

> "The executive, as such, can only execute the politics of the nation—that is, he executes the laws. Undoubtedly, the constitution and laws do in many instances trust matters to the discretion of the executive. In such instances no other department can control the exercise of that discretion, but all are bound by it. But the difficulty in applying that doctrine in the manner attempted by the attorney general is that the constitution and the laws have not entrusted to the executive, unless in cases where the writ of habeas corpus is legally suspended, any political discretion to imprison the people. On the contrary, that matter was deemed of such vital importance that the people regulated it in the fundamental law of their politics, and provided that 'no person shall be deprived of his life, liberty or property without due process of law.' The constitution knows no 'political' process, no 'political' cause of imprisonment. There must be a 'process of law,' a legal cause of restraint. And the power to determine what is a legal imprisonment, and to discharge from any that is illegal, is, except when the writ is suspended, a power conferred on the judicial department."

Again the court says:

> "If, then, the military may resort to the extreme of taking human life in order to suppress insurrection, it is impossible to imagine upon what hypothesis it can be successfully claimed that the milder means of seizing the persons of those participating in the insurrection or aiding and abetting it may not be resorted to."

The power to take the life of an insurgent does not include the power to take the life of a person not an insurgent. And, if that be true, then by the process of reasoning that the court adopts, if the military authority may not take the life of one not an insurgent, they may not imprison a person who is not an insurgent. The question is, may the military authorities, when a county is declared to be in a state of rebellion, arrest any person, whether guilty or innocent, and detain him until the executive declares that order has been restored? This question is not answered by the assertion that as the military "may resort to the extreme of taking human life in order to suppress insurrection, it is impossible to imagine upon what hypothesis it can be successfully claimed that the milder means of seizing the persons of those participating in the insurrection or aiding and abetting it may not be resorted to." The question can be answered in the affirmative in no other way than by declaring that the executive has the power to suspend the privilege of habeas corpus, or by declaring that martial law prevails whenever the executive so proclaims. The decision has applied the articles of war to conditions that do not justify their application. Whatever may be said of the deplorable condition in San Miguel County that resulted in foul assassinations, in murder and in plunder, so revolting to the law-abiding citizen, these conditions were past at the time the petitioner was taken there. The civil authorities of the county, with the aid of the military, had full possession and control; and if the petitioner was in any way implicated in the commission of these foul crimes, it should have been so charged.

The court then says:

> "No case has been cited where the precise question under consideration was directly involved and determined, but in cases where the courts have had occasion to speak of the authority of the military to suppress insurrection and the means which may be employed to that end, it has been stated that parties engaged in riotous conduct render themselves liable to arrest by those engaged in quelling it."

Chancellor Kent, at page 8 of volume 2 of his Commentaries, says:

> "It requires more than ordinary hardiness and audacity of character to trample down principles which our ancestors cultivated with reverence, which we imbibed in our early education, which recommend themselves to the judgment of the world by their truth and simplicity, and which are constantly placed before the eyes of the people, accompanied with the imposing force and solemnity of a constitutional sanction."

What connection there is between the right of a military officer to arrest a person on suspicion only and hold him without preferring any charge against him, because he fears he may commit an offense, and the right of an officer to arrest a rioter caught red-handed, I cannot comprehend. Although it is true, as stated by the court, that the precise point upon which the decision rests has never been determined by other courts, it is not because that point was not presented and urged by counsel, nor because the opportunity for so deciding was not afforded the judges; and it must be that the reason the point has not been sustained by some other court is that no other court could concede to the executive all the power he would have if the privilege of the writ of habeas corpus were suspended without determining that he had the power to suspend the writ. During the great rebellion, when millions of soldiers were in the field and when hundreds of persons in the loyal states were suspected of actively aiding those engaged in the rebellion, and arrested, the courts might have held that the necessity for putting down the rebellion carried with it the power to arrest and detain suspected persons, notwithstanding the guarantees of the constitution, but not one of them did so. There is no dearth of authority in this country or in England directly contrary to the ruling of this court.

I can find no middle ground to stand upon; and I most certainly cannot assent to the novel doctrine announced by this court. If one may be restrained of his liberty without charge being preferred against him, every other guarantee of the constitution may be denied him. For, as said by the Supreme Court of Illinois:

> "It is undeniable, if the government have the right to arrest him without a warrant and imprison him without a trial or charge of any criminal offense, it had an equal right to send his case before a court martial or military commission. The right to do the one necessarily implies the right to do the other, because both rest on the same theory of power to be exercised by the government in time of war. If it was lawful to arrest and imprison the plaintiff without any form of judicial investigation, it would certainly have been not less lawful to do the same thing upon the finding and sentence of a military tribunal. It can hardly be said that the laws of war could be applied to the plaintiff for the purposes of punishment, but not for the purposes of trial." (Johnson vs. Jones, 44 Ill., 156.)

The constitutional privileges are not, in the nature of things, separable. It was intended by our fathers that all should be inviolable except one, and that to be suspended by the legislature only in case of great emergency. Martial law exists or it does not exist. When it exists there is no civil law. Martial law and civil law cannot exist together. If the civil law can enforce one guarantee, it can enforce all. If the civil law is overthrown it is powerless to enforce any right. When martial law does not prevail, unless the privilege of the writ of habeas corpus is suspended, every right guaranteed by the constitution is enforceable; and the constitution is violated, rudely violated, when one is deprived of liberty without due process of law.

Habeas corpus is a proper remedy to release from arbitrary arrest, and, unless its privileges have been suspended, one is not subject to arrest on suspicion merely, and detention beyond the time fixed by statute for return to the writ. As the privilege of the writ has not been suspended, as the courts are open, as martial law does not prevail, and as no charge has been preferred against the petitioner, he should be discharged.

The greatness of this country consists in being able to protect, by the shield of its constitution, the humble and the exalted, the pure and the wicked. We gave the wretched Guiteau, Prendergast and Czolgosz trials by due form of law, and by so doing we strengthened the nation at home and abroad. Had we departed from the principles declared by our fathers, we should have lessened the liberty of every citizen and imperiled the title to all property.

When we deny to one, however wicked, a right plainly guaranteed by the constitution, we take that same right from everyone. When we say to Moyer, "You must stay in prison because, if we discharge you, you may commit a crime," we say that to every other citizen. When we say to one governor, "You have unlimited and arbitrary power," we clothe future governors with that same power. We cannot change the constitution to meet conditions. We cannot deny liberty today and grant it tomorrow; we cannot grant it to those theretofore above suspicion and deny it to those suspected of crime; for the constitution is for all men —"for the favorite at court, for the countryman at plow"— at all times and under all circumstances.

We cannot sow the dragon's teeth, and harvest peace and repose; we cannot sow the wind and gather the restful calm.

Our fathers came here as exiles from a tyrant king. Their birthright of liberty was denied them by a horde of petty tyrants that infested the land—sent by the king to loot, to plunder and to oppress. Arbitrary arrests were made; and judges, aspiring to the smile of the prince, refused by "pitiful evasions" the writ of habeas corpus. Our people were banished; they were denied trial by jury; they were deported for trial for pretended offenses; and they finally resolved to suffer wrong no more, and pledged their lives, their property and their sacred honor to secure the blessings of liberty for themselves and for us, their children. But if the law is as this court has declared, then our vaunted priceless heritage is a sham, and our fathers stood "between their loved homes and the war's desolation" in vain.

THE ROBERT W. STEELE SCHOOL BUILDING, DENVER, COLO.

CHAPTER IX

FREE SPEECH AND A FREE PRESS

"That no law shall be passed impairing the freedom of speech; that every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact."—Colorado Constitution, Bill of Rights, section 10.

"That newspapers sometimes indulge in unwarranted criticism of the courts cannot be denied. In some instances they construe liberty of the press as a license to engage in wholesale abuse of the court, but these instances are rare and do not warrant a departure from the well settled principles of law as declared by congress and construed by the courts. If judges charged with the administration of the law are not to be criticised on account of their official conduct, the liberty of the press is abridged and the rights of individuals are imperiled."—Judge Pritchard, U. S. Circuit Court North Carolina, July, 1904.

"For no judge and no court, high or low, is beyond the reach of public and individual criticism."—Justice Brewer, when judge of the Supreme Court of Kansas.

"I do not contend that one who in open court charges a judge with corruption may justify his act by proof that his charge is true, but I do contend that when the alleged contempt consists of the publication in a newspaper of defamatory accusations, such publication is not contempt, but libel, and that the constitution intervenes to prevent that offense from being tried by judges who are smarting under a sense of injury; and that when a court takes cognizance of a newspaper libel, either directly or remotely connected with a pending case, upon the ground that the publication was calculated and intended to influence its action, it ought, nevertheless, to prosecute and convict only for the contempt, and not for the libel; and that, so far as the libel is concerned, the truth is always a justification, no matter what the court is pleased to call the offense."—Justice Robert W. Steele, the dissenting opinion in the Patterson case.

In the latter part of the year 1905 there came into the Supreme Court of Colorado a case which was, in its practical effect if not in its legal significance, an arraignment of the newspapers of Colorado. Primarily an action for contempt against the News-Times Publishing Company and former Senator Thomas M. Patterson, it involved in its discussion and its decision the constitutional right of free speech, the privilege of the public newspaper to criticise public officials, and in a measure the entire subject of the rights, the duties and the relations of newspapers, their editors and proprietors, toward the courts, the government and the people of the state.

An opinion had been prevalent for some time among the people that the average daily newspaper was to be counted among the forces of disorder and lawlessness, and this opinion had been strengthened by glaring examples of sensationalism and partisanship on the part of some newspapers and also by earnest efforts on the part of those who had personal reasons for shunning the light of newspaper publicity. Yet it is easy to show that the newspapers of that time were in far greater danger of becoming the controlled organs of machine politicians and of the great financial and corporate interests than they were of catering to the passions of the mob and aiding the forces of anarchy.

It is a long step in human progress from Benjamin Franklin's "letters" and his hand press to the complicated typesetting machines and the web perfecting presses that turn out many-paged and many-colored newspapers, a thousand copies in a single minute. To start or to conduct a newspaper in modern days requires much more than an ardent desire and a few dollars. A linotype machine costs $3,500. A perfecting press represents an investment of $20,000 or more, in addition to the expensive electrical equipment necessary to supply motive power. Even the reporter writes with a hundred-dollar typewriter instead of with a five-cent lead pencil. And that is far from being all the difference between the old and the new. A nose for news and a pair of shears still have their important place in newspaper work, but a real daily newspaper has to have the service of the great co-operative news gathering association, and that is a matter not merely of a regular payment of a large amount of money, but also of a right of membership that is jealously guarded and exorbitantly valued.

The modern newspaper is enormously capitalized. It is not, and it cannot be, a free press in the sense of being an open medium for the expression of the opinions of everyone that has a craving to sound his thoughts in the public ear. Its freedom is limited by the sources of its capital and of its income, by its stockholders on one side and by its advertisers or its subsidizers—if it has any—on the other. Under such conditions there is comparatively small danger that the modern newspaper will become the vehicle of such folly, vituperation and anarchism as characterized the placard, the pamphlet and the cheaply produced newspaper of early days. There is far greater danger that it may become allied with the forces of inordinate wealth and special privilege. A daily newspaper in an American city of a hundred thousand people may easily represent a capitalized investment of a half million dollars. Almost inevitably it must be a defender of law and order and an advocate of the rights of property, for it belongs in the ranks of moderate wealth, law and order are a necessity for its own business, and the rights of property are its own rights.

That the modern newspaper has been the center of a great struggle for its possession and control everyone knows who knows anything about the inside of newspaper work in recent years. On one side a persistent effort has been made to subjugate the newspaper to the forces of machine politics. Public advertisements, such as tax lists, election notices and lists of nominations, paving and sewer notices, financial statements, laws and ordinances proposed or passed, and other similar forms of publicity, controlled by political machines, have been used to whip newspapers into line for partisan uses. Laws have been passed, nominally in the interest of non-partisanship, by which partisan loyalty was made the qualification for public advertising.

From another side there has been in many cases a strong and purposeful effort to bring the newspapers under the control of large business interests and to make them the voice, not of public opinion, but of special interests, and the methods by which this purpose was forwarded have ranged from outright purchase, through innumerable forms of subsidies, loans and contributions.

In general, the American newspaper has resisted these attempts at its subjugation to a surprising degree, but the reason for this is a very simple matter of business. Inasmuch as its success is dependent upon the favor with which it is received by the public, it must represent the opinions and the desires of at least a considerable portion of the people of the community in which it circulates. If there ever was a time when the average reader was willing to accept a newspaper statement as authoritative, without consideration of the personal source of the utterance or the motives that lay back of it, that time is long past. The average newspaper reader of today is both skeptical and critical, and, with all due credit to the "power of the press," which is undeniably great, the supreme skill of the modern editor lies in interpretation and not in prophecy. The modern newspaper reader does not want to be told what he ought to think, but what he already thinks. The newspaper that seems to have the strongest influence is merely the one that has the greatest skill in forecasting what the people are going to think and to do, and in agreeing with them, in advance.

The modern newspaper is not unpurchasable in the sense that its material possessions cannot be bought. Company stock, name, press, typesetting machines, Associated

Press membership and all the minor items of its inventory may be sold. But the good will of the public cannot be sold or transferred, except in a minor and limited degree; for the good will and confidence of the people are dependent upon the skill and fidelity with which the directors of a newspaper are able to discern and to express and to promote the wishes and the opinions and the interests, not of their owners, not directly and primarily of their advertisers, but of their readers.

The modern newspaper is unpurchasable, not because of any superior virtue of its owners and editors above their fellow men, but because the power of the modern newspaper is not inherent in a material instrument and machine that can be transferred from one ownership to another to serve the selfish purpose of its temporary possessor or master.

If such be the case—if the modern newspaper, save for rare exceptions, is inseparably bound in its interests with the forces of law and order and to the rights of property; if it is far more seriously threatened by the control of wealth and privilege than by the passions of the mob; and if it retains through the inevitable circumstances of its business existence the confidence of a large portion of the people and thereby serves its legitimate function as a voice of public sentiment—its constitutional liberties ought not to be abridged. The power of the press, as a factor in business, politics and government, has increased with the passing years; but in the exercise of that power it is the people, rather than the public officials, or the great corporations, or the political bosses, who need additional safeguards. The recognition of this need has brought the recent requirement of a periodic statement of owners, editors and bondholders as a condition of second class mail privileges.

In the case against the News-Times and Senator Patterson, questions of constitutional right, of the liberties of the people, and broad and far-reaching principles of public policy were involved, and it is for that reason that Justice Steele's dissenting opinion in this case deserves to rank with such a fundamental argument for liberty as was presented in the Moyer case. The right of free speech and of a free press must always remain as a priceless instrument and safeguard of liberty, and a great judge could render but few services of greater importance than to perceive when this right was impaired or endangered, and to set himself resolutely to its defense.

In its decision the Supreme Court ruled that the articles and cartoons constituted constructive contempt, that the offense consisted in the publication of such matter, and that it was entirely immaterial whether the matter published was true or false. It should be noted in passing that the use of the word "contempt" in this connection is both unfortunate and misleading to the ordinary reader. Even the honorable judges of many courts seem to have found it hard to understand that personal depreciation of their ability, their wisdom or their integrity is not an offense that they have a right to punish. A judge as an individual may be utterly contemptible, and every honest citizen may feel for him that contempt which he merits without coming under any prohibition of the law. A citizen may even cherish, if he please, a profound and utter contempt of a judge who is wholly unworthy of such disesteem, without incurring any legal penalty. Furthermore, a citizen has the same right to express his disapproval of a judge, by word of mouth or by publication in a newspaper or elsewhere, that he has to express his contempt of any citizen, or of any public official, subject to the law of libel and subject to the further condition that he shall not interfere with the course of justice in the conduct of the courts. That freedom of speech and of writing is a constitutional right, guaranteed to him by the constitutions of the nation and the state, and committed to the keeping of the judicial department together with other rights that constitute the written charter of liberty.

"Contempt," as a crime against the courts, involving punishment by fine or imprisonment, is an interference with the course of justice—that and nothing else. Primarily it is an act committed in the presence of the court tending to disturb its proceedings, to weaken its authority or to affect its decisions; or a disobedience to its rules, orders or processes. Secondarily it is such an act, wherever committed, as will interfere with the free and impartial acts and judgments of the courts, and this secondary contempt is what the lawyers call "constructive contempt." A judge, as a judge, properly comes within the protection of contempt proceedings, for he is a part of the machinery of the law, and an interference with him when acting officially is an interference with the course of justice. The judge as an individual or as a political partisan or candidate does not properly stand within the scope of that protection. The power to punish for contempt is given to the judge in order to enforce his official authority and to prevent interference with the course of justice, and the judge has no more right to use that power to salve his wounded self-love, or to promote partisan advantage, or to protect himself from personal or political criticism, or to serve any other personal and selfish interest, than he has to send his enemy to the gallows for cause of personal hatred or to appropriate the furnishings of the courtroom to his private use.

There is no dispute about these principles, for they are universally acknowledged, at least in theory. But constructive contempt, which is to say a secondary and indirect interference with the course of justice, covers a vast field of doubtful and debatable ground, and it is in that field that the decision in the Patterson case is to be located. The majority opinion in that case, which is the decision of the court, holds that the publication of certain articles and cartoons published in the *Times* and the *News* in the year 1905 constituted an interference with the court, and that the truth of those articles could not be alleged as a justification for such interference. Upon the law and the facts that decision stands as the supreme legal authority in this state, and the Supreme Court of the United States has upheld the right of this court to act within its jurisdiction in this matter. The view of the case from the opposite side is fully and most ably set forth in the dissenting opinion of Justice Robert W. Steele, which is printed in full as the following chapter of this book. There is nothing that can be added to its clear exposition of the legal and constitutional principles involved, to the weight of authorities cited or to the powerful and illuminating exposition of the public interests concerned.

The student and historian of current events may well consider the Patterson case in a wider light than is proper or convenient for the lawyer or the judge. It would not be justifiable to assert as a fact what was believed by many at that time, that the contempt proceedings against Senator Patterson were the result of a deliberate purpose to punish him for his partisan activities, or that they represented an intentional step toward fixing the control of a group of large corporations upon the newspapers as a part of a great conspiracy to seize and hold the government. It is a fact that there has been manifested a tendency, nation-wide in its extent, to commercialize and to control the great daily newspapers by large and powerful special interests, and in particular by the public utility corporations, and the full significance of the Patterson case cannot be understood except in this connection.

It is true, further, that the Patterson case, in the criticisms to which objection was made, and in the opinions rendered by the majority and the minority of the court, was the outgrowth of other controversies, mainly partisan as well as political in their nature. In his formal answer to the charge of contempt, which will be found on page 283 *et seq.* of volume 35 of the Colorado Reports, Senator Patterson avers that a large number of public utility and industrial corporations, specified by name, with the mine owners' association of Cripple Creek, determined through their agents and representatives to secure the renomination and re-election of Governor Peabody, in order that they might, among other inducements, secure from him the nomination of two Supreme judges whom the governor was authorized to appoint, to the end that the utility corporations might obtain decisions from the Supreme Court confirming, extending and securing to them immensely valuable franchises, and that the railroad and other corporations might obtain decisions favorable to them in the many cases in which they were being constantly involved; that the said Peabody and the said agents and representatives of said corporations entered into a contract and agreement that if he should be renominated and re-elected through and by the agency of the said corporations and the money they might expend therefor he would permit them to name the persons for the two judgeships. On information and belief he further averred that these corporations contributed $40,000 to secure the renomination of Peabody, and that they contributed $200,000 to secure his re-election; that after Peabody had been defeated in the election these corporations undertook to induce the legislature to change the returns so as to show the election of Peabody; that the supervision of the general election of November, 1904, by the Supreme Court, was a part of this corporation conspiracy, as was the further direction of that court regulating the canvassing of the returns; and that the Adams-Peabody contest in the legislature, and the final arrangement by which the lieutenant governor became acting governor, and the appointment of two judges of the Supreme Court, were a part of the developments of this conspiracy.

> "And the respondent avers that to state the truth is not and cannot be a criminal contempt of this honorable court, and he avers upon information and belief that the allegations and statements in the said published articles for which he is arraigned, omitting the innuendoes inserted therein, in the information, by the attorney general, are true, and this respondent especially sets up and claims, under the constitution of the United States and under the constitution and laws of the state of Colorado, the right and privilege of introducing witnesses to prove the truth of such allegations, averments and statements in said published articles contained, and of the things set up herein as his justification and defense. All of which matters and things hereinabove contained this respondent stands ready to maintain and prove."

The Moyer case, involving the basic right of personal liberty; the Adams-Peabody controversy; the then pending matter of the right of cities to local self-government; the assumption of judicial control of state elections; the domination of the state government by the system of machine politics through which the bosses of the political machine nominated, elected and in large measure controlled all branches of the state government, executive, judicial and legislative—formed the subject matter with which Senator Patterson flayed those justices of that high tribunal who were under the power of his lash. Much of that criticism was shocking to the sober-minded citizens of the state, regardless of its truth or falsity; some of it, perhaps, was libelous, though that has not been determined; much of it was constructively contemptuous, for upon that the highest legal authority of the state has recorded its formal decision and has enforced its punishment therefor in a fine of one thousand dollars. But the decision of the court, however great its authority is in matters of law, is not supreme in matters of public policy. The judges say what the law is; but the people make both the law and the judges, provided always that the American system of popular self-government by the will of the majority of the people is in full force and effect.

For the judge who acknowledges his commission from the people and not from the machine, who invariably holds his official conduct to the standard of the public welfare, who never uses his official authority to serve the ends of partisan advantage or selfish interest, who is untiringly vigilant for the maintenance of every safeguard of popular liberty which the fathers have established, and who is serenely and sincerely conscious of his own integrity of act and motive, "constructive contempt," as a method of protection for personal or official dignity, seems but a poor and shabby cloak. From the invulnerable shield of his integrity the shafts of envy and malice fall broken to the ground, while the weapons of partisan calumny only rebound to strike down, amid the popular applause, those that wield them.

"The truth is no defense in a proceeding for contempt against the publisher of a newspaper for publishing articles charging a court or the judges thereof with being influenced by corrupt motives in their actions with reference to a pending cause." That is the law, for the judges of the Supreme Court of Colorado (Mr. Justice Steele dissenting), with full authority, have so ruled.

And the people of the state of Colorado since that decision have written into the organic law of the state both the recall of judges and the recall of judicial decisions. And that also is the Law.

CHAPTER X

THE OPINION IN THE PATTERSON CASE

On February 6, 1906, the Supreme Court of Colorado handed down its decision in the case against the News-Times Publishing Company and Thomas M. Patterson. This opinion was written by Justice Julius C. Gunter, and it was approved by Justices Gabbert, Campbell, Bailey, Maxwell and Goddard. At the same time a minority opinion was returned by Justice Robert W. Steele. Both these opinions are to be found in volume 35 of the Colorado Reports, beginning on page 253. The majority opinion occupies 142 printed pages, and its principal conclusions are thus summarized in that volume:

> "7. Articles published in a newspaper of general circulation charging the Supreme Court and certain of its judges with having been influenced by corrupt motives in their rulings theretofore made in pending causes, and that they would be so influenced in the final disposition of the same, constitute criminal constructive contempt.
>
> "8. In a proceeding for contempt against the publisher of a newspaper for publishing articles charging a court or the judges thereof with being influenced by corrupt motives in their actions with reference to a pending cause, the truth of the publication is no defense. Neither is it a defense to show that there was no intent to commit contempt. Nor to show that the court was not affected by the contemptuous language."

Justice Steele's dissenting opinion may be found in the same volume, beginning on page 395, and it is as follows:

Mr. Justice Steele, dissenting:

The court has punished the respondent for a mere libel, under a proceeding for contempt; and has held that the truth is not a justification, and that, when the truth is pleaded as a justification, the pleading of it is a direct contempt and as such is punishable summarily. To do this it was necessary for the court to set aside acts of the legislature and to hold that that section of the bill of rights which declares that "every person shall be free to speak, write or publish *whatever he will on any subject*, being responsible for all abuse of that liberty; and that in all suits and prosecutions for libel, the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact," is inapplicable. As I am of opinion that it is not a crime in this state to speak, write or publish the truth of or concerning the official conduct of public officers, I must dissent from the judgment.'

The respondent's purpose in publishing the articles complained of is briefly stated in his reply to the question by the chief justice whether he had anything further to say why the judgment of the court should not be pronounced. He said:

> "I feel, if your honors please, that, without having the slightest idea what punishment the court will inflict, under the circumstances of this very peculiar case I should say something why I should not be punished for contempt.
>
> "Certain articles were published in *The News* and *The Times* for which the writing or publication, or both, I was and am responsible.
>
> "The chief justice, in his own way, saw fit to initiate contempt proceedings by reason of these articles, and as a result of his steps the attorney general filed this information, commanding that I should show cause why I should not be punished for contempt, the allegations in the information being that these articles were contemptuous of the Supreme Court and certain of its judges.
>
> "This court can rest assured that when that information and citation were served upon me I was confronted with perhaps as serious a situation as I have ever been face to face with in all the years of my manhood. I have felt, if the court pleases, the importance of maintaining the honor and dignity, not only of this court, but of minor courts, as keenly and as sincerely as any other citizen of the commonwealth; and one of the most gratifying episodes in my life was when Mr. Justice Campbell, now upon the bench to try me, but a few years ago commended me in the warmest terms for the respect I had always shown to courts with which he was associated, whether sitting as a *nisi prius* judge or as a member of this great body.

"I want to say to the court that I realize as keenly as any man in the United States the importance of an unsullied judiciary, and the importance of that judiciary ever maintaining the respect and the confidence of the people, for, if all else fails, it may be that the people of this country must depend upon the justice, the integrity and the patriotic spirit of our highest courts to preserve the liberties of the country.

"But, if your honors please, I have always felt that there should be reciprocity between courts and the people. While the courts should receive the respect and confidence of the people, there is a duty devolving upon the courts to ever maintain the law and the integrity of the constitution, and to keep within the limits prescribed by the constitution and laws of the state and the country; and in every one of their judgments, as their consciences tell them, to do the very right, and nothing but the right. If these relations exist between the people and the bar upon the one side and the courts of the country upon the other, there will be little need of contempt proceedings, and there will be little provocation for criticism either of the courts, or by the courts, of the public press.

"So far as these articles are concerned, I want to say that I never wrote or published articles in my life the justice of which I was more sincerely convinced of; not only convinced of the justice was I, but of the necessity for their publication, and when this citation was served upon me, as I said, I was confronted with the most serious situation in which I had ever found myself in all of either my public or my private life. From all the information I could obtain after careful investigation—from those whose word could not be doubted—I felt that whatever was in those articles was justified, and the question was then up to me: Shall I, to escape the wrath of the court, say that I have been a slanderer, a libeler? Shall I proclaim to the public that I am infamous, in that I falsely charge the Supreme Court of my state with such things as are supposed to be contained in those articles? Or should I do what any true man ought to do, firmly believing that he spoke the truth—say that he had spoken the truth and offer to establish the verity of the articles?

"That, may it please the court, was the reason for the answer I filed.

"The attorney general tells the court that this court should not for a moment sit to investigate charges against its membership. I can only say, if your honors please, that is the most stupendous indictment that can be framed against this whole doctrine of constructive contempt; or, has it come to this in the United States, that the publisher of a newspaper, because men are judges, may not speak the truth of them as to their official actions, except at the peril of confinement in the common jail, the payment of heavy monetary penalties, or both?

"I realize, if your honors please, that so far as the legislature of this state is concerned, it has done everything in its power to change that condition. It has declared what shall be contempt, and has omitted everything with reference to constructive contempt;

therefore, so far as the legislature is concerned, it has eliminated proceedings in constructive contempt from the powers of the court. The legislature has further provided for answers in contempt proceedings, for investigations, for juries, has fixed a limit to the power of the court in assessing punishments for contempts, and if constructive contempt is to be maintained, as it has been maintained by this court, it can simply mean—and I speak it in a thoroughly impersonal way, so far as the membership of this court is concerned, I speak it as though I were addressing an impartial jury with no duty devolving upon its membership except to find and declare the truth—if this is to be maintained it simply means that we have in each of the states of this Union a chosen body of men who may commit any crime, who may falsify justice, who may defy constitutions and spit upon laws, and yet no man dare make known the fact.

"So far as I am concerned, if the court please, I am unwilling to be bound by such a system, and, therefore, if no other result is to come from these proceedings beyond my own punishment than the arousing of the public to the danger of such a power in the hands of any body of men, a great good will have been accomplished; more, perhaps, than is necessary to compensate for what I may suffer. And I only desire to say, further, before I sit down, that no matter what penalty the court may inflict, from this time forward I will devote myself—by constitutional amendment if necessary, and by the decisions of the court it has become necessary—to deprive every man and every body of men of such tyrannical power, of such unjust and dangerous prerogative, of the ability to say to publishers of newspapers: 'While about everybody else you may speak the truth, no matter what our offenses may be, you speak the truth with the open door of the jail staring you in the face, or the depletion of what you may possess of this world's goods, and probably of both.'

"If the court please, I am now ready to receive the judgment of the court."

The opinion of my brother Gunter, which, I am pleased to note, is based upon the doctrine of *stare decisis*, rather than his own opinion, declares: First—That an affidavit is not essential to the jurisdiction of the court in cases of constructive contempt. Second—That the offense of constructive contempt was committed by the respondent by publishing the articles set out in the information and that a direct contempt was committed by filing the answer. Third—That it is immaterial whether the articles or the averments of the answer were true or false.

I shall discuss these matters in their order, and shall endeavor to demonstrate that the court, instead of announcing the law applicable to the conditions of the people and the institutions of this country, has revived the oppressive and tyrannical doctrines of the star chamber. In no case found in the Colorado Reports was the proceeding begun without affidavit; and in every one, as I read them, where the subject is mentioned, it is stated that an affidavit is essential to the jurisdiction of the court. The attorney general appears to have regarded an affidavit as necessary; for, before the return day of the order to show cause, he, under leave of court, attached his verification to the information. This, of course, did not cure the defect, if any existed; for, if an affidavit is essential to give the court jurisdiction, it must be filed as the initial step in the proceedings. The opinion correctly states that up to the time of the decision in People vs. Wyatt, 17 Colo., 252, there appears to have been no distinction made in the opinions between civil and criminal contempts; but I do not agree with the court in its statement that the case of Thomas vs. The People, 14 Colo., 254, which holds that an affidavit is essential to the jurisdiction, has been overruled by the decision in the Wyatt case. The holding that an affidavit is essential has been expressly affirmed; and in the Wyatt case it is held that an affidavit is required by the common law. The court says, in the Wyatt case:

> "Constructive contempts—those not committed in the presence of the court—must, of course, in some regular and legitimate way be brought to the court's knowledge; until this is done the process of attachment will not issue." * * * And in Gandy vs. The State, *supra*, it is said that such proceedings must be commenced by a sworn information. But the practice generally recognized throughout the United States, and according to Blackstone frequently followed in England, is for some proper official or interested party to set forth by affidavit the material facts relied on. A little contrariety of opinion exists as to whether the warrant of commitment or the order of court must recite the jurisdictional facts. But the overwhelming weight of authority in this country sustains the proposition that the affidavit upon which the proceeding for a constructive contempt is based must state facts which, if established, would constitute the offense; and that if the allegations of

the affidavit are not sufficient in this respect the court is without jurisdiction to proceed. Rapalje on Contempts, sections 93-94, and cases cited; Mullin vs. The People, *supra;* Thomas vs. The People, *supra;* Cooper vs. The People, *supra;* Wilson vs. The Territory, 1 Wyoming, 155; *ex parte* Peck, 3 Blatch. (C. C.), 113; McConnell vs. The State, 46 Indiana, 98; Phillips vs. Welch, 12 Nevada, 158; Gandy vs. State, *supra;* Batchelder vs. More, 43 California, 412. Some of the opinions above cited refer the authority for the affidavit to statutes similar to section 322 of our civil code. But the statute mentioned and others of like tenor are simply declaratory in this particular of what may fairly be termed the modern common law practice. And the rule concerning the materiality of the affidavit should prevail to the same extent in the absence of statute. * * *

"The position of those authorities which hold that where the contempt is constructive the affidavit must show the offense commends itself with irresistible force. A proper regard for the liberty of the citizen forbids the arrest of parties upon criminal attachment charged with this kind of contempts, without information under oath touching the precise character of the alleged offenses."

Wyatt was discharged for the reason that the court was without jurisdiction. This, although the judgment of the court recited the fact essential to jurisdiction, the affidavit failing to set forth such fact. This does not appear to overrule the case of Thomas vs. The People, but appears to approve it. The case is cited with approval and holds, as does the Wyatt case, that unless an affidavit showing facts constituting contempt is presented the court is without jurisdiction; and the practice of instituting the proceeding by affidavit in cases of contempt not committed in the court's presence has been invariably followed in this jurisdiction.

In reviewing the Wyatt case the court says:

"The question that the court considers is not whether the information filed in the court as a basis for the attachment should have been verified, but whether or not it stated facts sufficient to constitute a contempt of court. It held that it did not do so, not because the court could not punish for constructive contempt, but for certain facts omitted from the information not material to this ruling, as, for example, an order of the court requiring the grand jury to make the inspection refused by the respondent. The court then considers the question as to whether the missing matter is supplied by the answer, and while not holding whether it could or could not be so supplied, held that the information was not aided in such particular by the answer."

The proceeding was commenced by affidavit, not by information. The court, of course, did not hold that the information must be verified, but it did hold that the overwhelming weight of authority sustains the position that the affidavit must state facts which, if established, would constitute the offense. It also holds that the principle generally recognized throughout the United States is for some proper official or interested party to set forth by affidavit the material facts relied upon, and the word "affidavit" is italicized. Mr. Justice Helm, writing the opinion, says:

> "It is not necessary to consider whether this jurisdictional defect could be waived, or could be cured by answer or other subsequent proceeding; for certain it is that such waiver or correction did not take place. The judgment, it is true, says that an order of court was disobeyed, and also that the grand jury was investigating a criminal offense. But this judgment was rendered upon the pleadings wherein no such order or its disobedience was alleged or admitted. * * * There is absolutely nothing in the record, save the judgment, intimating the existence of this order. To say that such recitals in the judgment are sufficient would be to nullify all attempts by appellate tribunals to inquire into the jurisdiction of the court pronouncing the same. It would be to make that court the sole arbiter as to what does or does not constitute a contempt, and render the judgment itself conclusive of this jurisdictional question."

This decision, it seems to me, does not sustain the contention of the court that it is not necessary that an affidavit be presented, but clearly says that an affidavit must be presented, and that unless an affidavit is presented the court is without jurisdiction.

As a reason for holding that an affidavit is not necessary, the court says:

> "This court has no power to compel the verification of an information for contempt—People vs. Court of Sessions, *supra*—to hold the verification of the information essential would be to deprive this court of the power in many cases to punish for criminal constructive contempts, which power, as we have seen, has been by our decisions declared to be inherent and essential to the existence of the court."

This means that there may be times when no one—the ever vigilant counsel, the ethical Bar Association, the zealous friend, or the officer designated by law to represent the authority of the state—would be willing—because no contempt had in fact been committed, because it would escape attention, or because the criticism was truthful and just—to initiate proceedings in contempt, and that the court should therefore have power to proceed; that whenever no one else is willing to maintain the dignity and honor of the court in this manner that it is essential that the court itself should have the power to act. It is difficult to conceive of a case in which there would not be some one willing and anxious to become the court's champion—although, in this instance, the court proceeded upon its own motion; and it would seem to be wise for the court to ignore publications or speeches charging its members with corruption and political intrigue. In the case reported in 46 Kan., 613, the court, in discussing this branch of the subject, uses this language:

> "And a careful examination of the authorities satisfies us that in all cases of constructive contempt, whether the process of arrest issues in the first instance, or a rule to show cause is served, a preliminary affidavit or information must be filed in the court before the process can issue. This is necessary to bring the matter to the attention of the court, since the court cannot take judicial notice of an offense out of court and beyond its power of observation. There are a few cases in the books where the courts have taken notice of constructive contempts, and issued process without any affidavit or information having been filed to bring the subject matter of the contempt to the attention of the court; but such cases are very rare in this country, and the practice is nearly or quite obsolete. The great weight of authority is certainly opposed to such practice. Courts should never be required to go about looking for contempts of their authority. To do so is sufficient to lower their dignity and bring them into contempt."

The court in the Stapleton case was careful to say:

> "This proceeding was not instituted or instigated by this court of its own motion. A party whose cause was pending in this court presented his sworn petition complaining of the articles published by respondents, and praying protection from such assaults pending the consideration and determination of his cause. We were thus bound to take cognizance of his petition or give some reason for refusing so to do. If we refused, what reason could we give? Could we say to petitioner: 'You are a convicted criminal and

> therefore you have no rights which this court is bound to respect?' * * *
>
> "It is true this court could have disposed of the petition in this case by quietly declining to take cognizance of it. Only petitioner, his counsel and a few of their confidential friends, perhaps, would have known of our refusal. But we should always have been conscious that we had been wanting in courage to meet a disagreeable issue, and that we had declined to hear a suitor because he was under the ban of a public newspaper's displeasure. The only just and honorable way, therefore, was to take jurisdiction of the proceedings and require respondents to show cause, if any they had, why they had thus deliberately and repeatedly assailed the honesty and integrity of this court in and about petitioner's cause."

The court has not only taken unto itself a power which most of the courts of the country do not regard as essential, but it has added another section to the enumeration of powers heretofore taken by the court, so that it is now essential to the very existence of the court that, in the event no one else is willing to take the initiative, it may proceed of its own motion to attach and punish those who incur its displeasure. In its struggle for existence, its necessities would seem to be without limit. To assert that such a power is necessary is the assertion of weakness, and inability to otherwise maintain dignity and the respect of the people. Of course, it is not essential to the existence of the court, notwithstanding the assertion to the contrary. If it is essential to the existence of the court, how does it happen that only a very few of the courts of the country have taken this power; that none of the federal courts could take it if they would; and that the Supreme Court of the United States has never regarded such a power as essential to its existence? What the court really means is this: not that it is essential, but that it is convenient. That, as the respondent made charges against the court which it did not relish (there being no one who would voluntarily present the matter), it was essential to the court's convenience and satisfaction that it should proceed *sua sponte.*

The respondent's plea to the jurisdiction is said to be a general appearance, and it is held that by filing his plea he waived the right to question the jurisdiction. The respondent, even if it be conceded that by moving to quash the information he entered a general appearance, could not confer jurisdiction upon the court except of his person. But, according to the authorities, the court has no jurisdiction of the subject-matter unless an affidavit is presented setting forth the facts constituting the alleged contempt; and it will not be seriously contended that jurisdiction of the subject-matter can be conferred by waiver or consent. The subject under discussion has no very important bearing upon the case at bar; for the court might have sustained the motion to quash and granted leave to refile, and ordered respondent to answer by the return day of the order to show cause. I dissent from the order overruling the motion, not so much because the respondent's rights and privileges have been infringed, as upon the ground that the court has, in my judgment, changed the practice that has always prevailed in this jurisdiction.

The following citations clearly declare that, unless the cause is pending and the articles are calculated and intended to influence the court in its decision, the court is without authority to punish for contempt. They not only bear upon the very subject under consideration, but discuss generally the whole matter, including the liberty of the printing press and the freedom of speech, and I quote at length from them because they seem to controvert every conclusion reached by the court.

In the case of Stuart vs. The People, 3 Scammon, 395, after quoting from several authorities upon the subject of constructive contempt, Mr. Justice Breese said:

> "Into this vortex of constructive contempts have been drawn, by the British courts, many acts which have no tendency to obstruct the administration of justice, but rather to wound the feelings or

offend the personal dignity of the judge, and fines imposed, and imprisonment denounced, so frequently and with so little question as to have ripened, in the estimation of many, into a common law principle; and it is urged that inasmuch as the common law is in force here, by legislative enactment, this principle is also in force. But we have said, in several cases, that such portions only of the common law as are applicable to our institutions and suited to the genius of our people can be regarded as in force. It has been modified by the prevalence of free principles and the general improvements of society, and whilst we admire it as a system, having no blind devotion for its errors and defects, we cannot but hope that in the progress of time it will receive many more improvements and be relieved from most of its blemishes. Constitutional provisions are much safer guaranties for civil liberty and personal rights than those of the common law, however much they may be said to protect them.

"Our constitution has provided that the printing presses shall be free to every person who may undertake to examine the proceedings of any and every department of the government, and he may publish the truth, if the matter published is proper for public information and the free communication of thoughts and opinions is encouraged.

* * * "The right to punish for contempts committed in the presence of the court is acknowledged by our statute; and while it affirms a principle that is inherent in all courts of justice to defend itself when attacked, as the individual man has a right to do for his own preservation, it may also, with great propriety, be regarded as a limitation upon the power of the courts to punish for other contempts. In this power would necessarily be included all acts calculated to impede, embarrass or obstruct the court in the administration of justice. Such acts would be considered as done in the presence of the court. So of rules entered by the court prohibiting the publication of the evidence or other matters while the case is pending and undecided. The limitation of the power to such cases only is better calculated to strengthen the judiciary and fasten it in the affections and esteem of the people, who have so large a stake in its purity and efficiency, than the enlarging the power to the extent claimed.

"An honest, independent and intelligent court will win its way to public confidence in spite of newspaper paragraphs, however pointed may be their wit or satire, and its dignity will suffer less by passing them unnoticed than by arraigning the perpetrators, trying them in a summary way and punishing them by the judgment of the offended party.

"It does not seem to me necessary, for the protection of courts in the exercise of their legitimate powers, that this one, so liable to abuse, should also be conceded to them. It may be so frequently exercised as to destroy that moral influence which is their best possession, until finally the administration of justice is brought into disrepute. Respect to courts cannot be compelled; it is the voluntary tribute of the public to worth, virtue and intelligence, and whilst they are found upon the judgment seat, so long, and no longer, will they retain the public confidence.

"If a judge be libeled by the public press, he and his assailant should be placed on equal grounds, and their common arbiter should be a jury of the country; and if he had received an injury, ample remuneration will be made.

"In restricting the power to punish for contempts to the cases specified, more benefits will result than by enlarging it. It is at best an arbitrary power, and should only be exercised on the preservative and not on the vindictive principle. It is not a jewel of the court, to be admired and prized, but a rod rather, and most potent when rarely used."

In speaking of Liberty of Speech and of the Press, Cooley, in his work on Constitutional Limitations, at page 520, says:

"Except so far as those guaranties relate to the mode of trial and are designed to secure to every accused person the right to be judged by the opinion of a jury upon the criminality of his act, their purpose has evidently been to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them. To guard against repressive measures by the several departments of the government, by means of which persons in power might secure themselves and their favorites from just scrutiny and condemnation, was the general purpose, and there was no design or desire to modify the rules of the common law which protected private character from detraction and abuse, except so far as seemed necessary to secure to accused parties a fair trial. The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."

Seymour D. Thompson, in reviewing the decision in the Stapleton case, said, in 28 American Law Review, page 122:

"The whole case, including the statement of facts and the opinion of the court, furnishes very painful reading. A considerable portion, both of the statement and of the opinion, is devoted to a vindication of the court against insinuations and charges made in language so reckless and extreme as to be unworthy on its face of the slightest credit. We are not commenting on the decision for the purpose of offering any opinion upon the propriety of the conclusion of the court. Undoubtedly, the publications quoted in the statement of the case constitute contempts at common law, and contempts which no editor in England would dare to commit, for the judges in that country would deal very severely with the authors of such a publication. It must also be said that such publications are a great public evil, for they tend to impair the just confidence which the public should possess in the integrity of their judges—a confidence which in the United States, as in the parent country, has seldom been misplaced. If the constitution and statute law of Colorado throw no restraints upon the power which judges possess at common law to punish contempts committed against their own dignity and authority, then undoubtedly the court reached the correct conclusion; and if the proceeding has resulted in imposing a severe punishment upon the authors of those wanton and malicious libels upon the integrity of the judges, no right-minded citizen will regret the fact.

"But what we want to draw attention to is this: That the offense thus committed, in so far as it was an offense personally to the judges, should have been redressed, if worthy of notice at all, in an action for damages for libel; and that, in so far as it consisted of public offense—an offense against the people of Colorado—it should have been redressed in a proceeding by indictment against the offenders, in which proceeding all questions of law and fact would have been, under the principles of American constitutions, committed to the decision of twelve disinterested and impartial citizens, instead of being decided by the judges who themselves were smarting under the sense of injury and outrage. Except so far as is absolutely necessary to protect their proceedings from interruption and their process from obstruction, the judges of a court, whenever they arraign a person for contempt of their court, present to the public the unseemly spectacle of a judge sitting in his own cause. In this case it was that and little else. We doubt whether the confidence of the people in the administration of public justice is not more deeply wounded by such a spectacle than by the publication of the libel and the passing it by unnoticed. It is, moreover, to be observed that in states where, as in Colorado, the people elect their judges, it is in accordance with the spirit of our institutions that the newspaper press should possess the same right to criticise the conduct of the judges which they possess to criticise the conduct of any other public officer. No sound reason can be urged for exempting the judges from public criticism for their official acts which will not equally apply to the officers of the legislative and executive departments of the state. The article of Mr. Pingrey in a former number of this publication, which attracted attention in England, contains valuable suggestions upon this question. The right publicly to criticise public officers and candidates for public office is a valuable popular right, which ought not to be unreasonably curtailed. But those who abuse the privilege by the publication of wanton and unfounded libels ought to be punished, but they ought to be punished not by the officers against whom the libels are written, but by the verdicts of impartial juries."

In the case *ex parte* Steinman, 95 Pa. St., 220, Chief Justice Sharswood, speaking of a former opinion of that court, said:

> "Some of the remarks in the opinion in that case have been much relied on by the learned counsel who argued as *amici curiae* in support of the action of the court below. But there are two considerations bearing upon the question which now exist, but did not at the time that decision was rendered. The first is the new provision on the subject of the liberty of the press which has been introduced into the bill of rights of the constitution of 1874, and the second is that at that time the judiciary was not elective. Judges, in 1835, were appointed by the governor, and their tenure of office was during good behavior. There might then be some reason for holding that an appeal to the tribunal of popular opinion was in all cases of judicial misconduct a mistaken course and unjustifiable in an attorney. The proceedings by impeachment or address were the course and the only course which could be resorted to effectually to remedy the supposed evil. To petition the legislature was then the proper step. To appeal to the people was to diminish confidence in the court and bring them into contempt without any good result. We need not say that the case is altered and that it is now the right and the duty of a lawyer to bring to the notice of the people who elect the judges every instance of what he believes to be corruption or partisanship. No class of the community ought to be allowed freer scope in the expression or publication of opinions as to the capacity, impartiality or integrity of judges than members of the bar. They have the best opportunities of observing and forming a correct judgment. They are in constant attendance on the courts. Hundreds of those who are called on to vote never enter a court-house, or if they do, it is only at intervals as jurors, witnesses or parties. To say that an attorney can only act or speak on this subject under liability to be called to account and to be deprived of his profession and livelihood by the very judge or judges whom he may consider it his duty to attack and expose, is a position too monstrous to be entertained for a moment under our present system."

The editor of the Central Law Journal, in discussing the decision of the Michigan court in the case of *in re* Chadwick, reported in 109 Michigan, and cited with approval by this court, says, on page 403 of volume 57 of that journal:

> "In view of this decision it may be well to emphasize the opinion which we expressed of this dictum in the case of *In re* Chadwick, 57 Cent. L. J., 102. If, as we have said, the dictum in that case was an 'unprecedented and revolutionary extension of the court's jurisdiction,' how much more so is it in a case which actually decides that point and attempts to sustain it by argument and the citation of ancient authority. The individual members of the court

> should have no greater rights in cases of libel than the governor or other officers of the state government in matters of libel. No halo of immunity from public criticism should surround the heads of the state's judiciary while other servants of the people, equally as honorable, must stand forth in the broad light of day open to attacks of adverse criticism and searching investigation on the part of the press and the people. The judiciary are but men, and therefore are as open to corrupting influences as those in control of any other of the co-ordinate branches of government, and, like them, need the deterring influence of free public criticism. Like them, also, they should have their individual actions for libel. Certainly no greater right to shut off adverse criticism can be given to them without throwing wide open the door to the corruption of the judiciary. The argument that it is the court and not the members thereof that has been libeled is purely metaphysical and does not rest on the facts. Every contempt of this kind that is ever committed is not against the court as a court, but against the court as then constituted; in other words, against the particular members of the court. No one but an avowed anarchist would denounce the court as an institution. A good judge will make the court highly respected, while a Jeffreys will bring it into contempt, but in both cases, in reality, it is the judge himself who is either respected or held in contempt. Any criticism not in regard to a case pending, therefore, alleged to constitute a contempt, must, in nearly every instance, constitute merely a libel on the judge or judges composing the court, for which, like other citizens, they should have their right of action, but no greater rights."

In State *ex rel.* Ashbaugh vs. Circuit Court, reported in 39 L. R. A., page 554, the court, in considering the question of constructive contempt, said:

> "Important as it is that courts should perform their grave public duties unimpeded and unprejudiced by illegitimate influences, there are other rights guaranteed to all citizens by our constitution and form of government, either expressly or impliedly, which are fully as important and which must be guarded with an equally jealous care. These rights are the right of free speech and of free publication of the citizen's sentiments 'on all subjects' (Const. U. S., Amend. 1; Const. Wis., art. 1, sec. 3); the right of trial by jury (Const. Wis., art. 1, sec. 5, 7), also the right to freely discuss the merits and qualifications of a candidate for public office, being responsible for the abuse of such right in a proper action at law. In the present case it is of the utmost importance to bear in mind that Judge Bailey was a candidate before the people for re-election. Had he been a candidate for any other office, it would not be contended by anyone that the publications in question would afford ground for any other legal action than an action for libel in the regular course of the law; but the claim is that because he was a judge, and was holding court at that time, such unfavorable

criticism of his past actions may be summarily punished by the judge himself as for contempt. Truly, it must be a grievous and weighty necessity which will justify so arbitrary a proceeding, whereby a candidate for office becomes the accuser, judge and jury, and may within a few hours summarily punish his critic by imprisonment. The result of such a doctrine is that all unfavorable criticism of a sitting judge's past official action can be at once stopped by the judge himself, or, if not stopped, can be punished by immediate imprisonment. If there can be any more effectual way to gag the press, and subvert freedom of speech, we do not know where to find it. Under such a rule the merits of a sitting judge may be rehearsed, but as to his demerits there must be profound silence. In our judgment, no such divinity as this 'doth hedge about' a judge; certainly not when he is a candidate for public office.

"In our opinion, it is not admissible, under our constitution, that a publication, however libelous, not directly calculated to hinder, obstruct or delay courts in the exercise of their proper functions, shall be treated and punished summarily, as a contempt of court." (Storey vs. People, 79 Ill., 45.)

If the publication was intended to influence the decision in a pending case, so as to prevent litigants from having a fair and impartial trial upon the merits, it should be punished as contempt of court. (Sturoc's case, 48 New Hampshire, 428.)

Mr. Justice Brewer, when a judge of the Supreme Court of Kansas, said:

"It will be borne in mind that the remarks we have made apply only while the matters which give rise to the words or acts of the attorney are pending and undetermined. Other considerations apply after the matters have finally been determined, the orders signed or the judgment entered. For no judge, and no court, high or low, is beyond the reach of public and individual criticism. After a case is disposed of, a court or judge has no power to compel the public, or any individual thereof, attorney or otherwise, to consider his rulings correct, his conduct proper, or even his integrity free from stain, or to punish for contempt any mere criticism or animadversion thereon, no matter how severe or unjust. Nor do we wish to be understood as expressing any opinion as to the power to punish other than attorneys and officers of the court for language or conduct even while the matter is pending and undetermined." (*In re* Pryor, 18 Kan., 72.)

In Telegram Newspaper Company vs. Commonwealth, 172 Mass., 294, the court stated that

"The publications contained statements of facts, evidence of which was not competent at the trial and was not introduced at the

> trial, and they were so made that it was likely that the presiding justice and the jurors would read them during the trial, and the natural and probable effect of them would be improperly to influence the justice and the jury in the determination of the cause.
>
> "The general rule is that to constitute any publication a contempt it must have reference to a matter then pending in court, and be of a character tending to the injury of pending proceedings upon it and of the subsequent proceeding." (Percival vs. State, 45 Neb., 741.)

Wharton, in his work on Criminal Pleading and Practice, speaking of constructive contempts, says:

> (Sec. 958.) "But in any view, to justify a committal, it must plainly appear that the effect of the publication is to interfere with the due administration of justice.
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> "We should remember, however, that summary conviction is a process only to be used when no other remedy can protect public justice from obstruction. For a judge, who supposes himself insulted, to fine and imprison his supposed insulter may be necessary, as where the insult is in open court and is of such a character that unless it is summarily stopped and punished the court cannot proceed with its duties; but to enable a judge to punish by summary procedure contempts other than those just mentioned is to set at naught, without adequate reason, some of our highest constitutional sanctions. Such a process dispenses with a grand jury. It inflicts punishment without conviction of a petit jury. It permits the party who supposes himself injured to be the tribunal which binds over, finds the bill, decides both the law and fact, convicts and sentences. We are also told, though, as will be seen, erroneously, by those who advocate the prerogative to its full extent, that the process is subject neither to writ of error, nor to revision by habeas corpus, nor pardon. But the prerogative rests on a vicious line of reasoning. The supposed contempt is such that the judge will or will not be intimidated or swerved by it in the discharge of his duty. If not, then there is no reason for such an extraordinary remedy. If otherwise, then for the judge to confess his weakness in this respect, and to make this confession in so conspicuous a way, is at least as injurious to public justice as is the publication in which the objectionable matter is contained. But there is another view beyond this. We can conceive not only of a weak judge who dreads intimidation, but of a corrupt judge who dreads exposure. To give a bad, bold man of this class an engine so potent as this is to take away one of the few means by which he can be exposed. Certainly a prerogative so violent and so damaging should not be exercised except in case of necessity.
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> "It may well be asked why, if such an extreme remedy is necessary in case of the judiciary, it is not in case of the executive. The executive, in cases of application for pardon, exercises a semi-judicial function, in which, equally with the judge trying the case,

it is important that he should be kept free from the influence of fear, favor or affection. The executive, when dealing with great questions of war, or almost equally great questions of currency expansion or contraction, should be in an eminent degree superior to the clamor of ignorant or timid or fanatical declaimers, and to the false public sentiment generated by a real but baseless panic. Who, however, would consider it consistent with either law or liberty for the executive to summarily arrest and imprison, without the relief of bail, without the interposition of a responsible prosecutor, without examination of witnesses, without the right of subsequent revision by habeas corpus, those from whom such publications should issue? Or, to take an alternative still more applicable, is such a prerogative safely to be claimed for the legislature? The legislature is co-ordinate in power and dignity with the judiciary. The legislature, either federal or state, has, no doubt, power to punish summarily for contempts by which the exercise of its distinctive functions is physically impeded; but can we rightfully claim for the legislature power to commit summarily persons criticising, no matter how unfairly or corruptly, measures over which it is still deliberating? But if the exercise of such a power is not permitted to executive or legislature, why should it be conceded to the judiciary? Or, if so conceded to the judiciary, why should we withdraw from the prerogative those general considerations of policy already noticed, which, while retaining for libels common law prosecutions, invoke, in the institution of such prosecutions, peculiar caution, tenderness and reserve? But, however these questions may be determined, two points remain: First, the doctrine of constructive contempt is of recent introduction, not being part of the common law brought with them to this country by our colonists; and, secondly, it is a violent remedy, justifiable only in cases not reached by bindings over to keep the peace, or bindings over for trial."

The case of Myers vs. The State, 46 Ohio St., 473, was the review of a cause originating in the Circuit Court at Columbus. Myers and another had been jointly indicted, and, upon the trial of the person joined with him in the indictment, Myers caused to be published in a newspaper circulated at the place of trial an article in which it was charged that the indictment was returned for partisan purposes, that the jury was never honestly drawn, and that the judge, clerk and prosecutor had packed the grand jury. The Supreme Court of Ohio, in considering the case, said:

"It was not the libel against the judge which constituted the offense for which the respondent was liable as for a contempt of court. The offense consisted in the tendency of his acts to prevent

> a fair trial of the cause then pending in the court. It is this offense which constitutes the contempt, and for which he could be punished summarily; and the fact that in committing this offense he also libeled the judge, and may be proceeded against by indictment therefor, is no reason why he may not and should not be punished for the offense against the administration of justice."

In applying the doctrine of a "pending case" the court has indulged in a mere fiction and has enlarged its powers as heretofore declared in the Cooper and Stapleton cases, where the court held that the articles were clearly calculated and intended to improperly influence a decision, and has punished for contempt a publisher who criticised the past action of the court. No party or person interested brought the matter to the attention of the court, and those in whose favor the judgments were rendered appear to have been entirely satisfied that their rights would be protected and that the mental poise of the court would not be affected by the publications. No one will seriously contend, I think, that the respondent had any intention or expectation of influencing the ruling upon a motion for rehearing. The parties were lost sight of completely. The judgments, while affecting individuals, in effect declared a constitutional amendment unconstitutional; and the respondent condemned the judges and impugned their motives. He was guilty of libel, and not of contempt, if the articles published were false. That the judges regarded themselves, and not the parties, and proceeded against the respondent for libeling them, rather than for intermeddling in a pending cause, is apparent from the fact that he is the only publisher in Denver against whom proceedings were commenced, although another journal, during the period covered by the articles in question, was in unmeasured terms commending the alleged patriotic action of the court, and announced that, although petitions for rehearing would be filed, they would be filed as a mere matter of form and without hope of favorable action.

The court says:

> "While such causes were before the court upon the petition for rehearing they were, as to the law of contempts, pending causes."

They were pending—theoretically. The court had rendered judgment. The opinions were filed, giving reasons for the judgments, as required by law. No petition for rehearing had been filed when the articles were published. The opinions were given out for publication, and, as they involved great public questions, they were published. By giving out the opinions, the court invited criticism, and should have expected that would happen which did happen—that they would be freely discussed in the public journals. It was not only the right of these journals to criticise at this most opportune time, but it was the right of the public to read and hear concerning them. Moreover, under our practice, nothing that has been presented will be considered by the court on petition for rehearing; so that, unless it is designed to stifle and prevent criticism at the time when it is intended the public should hear what judgments its judges are rendering, the rule announced by the court is unjust. But, whether it was so designed or not, its effect is the same; for it is left to the judges to determine when they will pass upon a petition for rehearing, and it may be a year or more after the judgment is rendered before the petition for rehearing is granted or denied. In a case filed by one Moyer in which the decision was rendered in the spring of 1904, leave to withdraw the petition for rehearing was not granted until the summer of 1905, although leave was asked in the summer of 1904. This was a case in which the people were vitally interested and the public had a right to hear the questions involved discussed, yet the court withheld its permission to withdraw the petition for nearly a year.

The judgment clothes every judge in the state with a power he should not possess; that it was never intended by our people that he should possess; and to possess which is altogether at variance with our free institutions. The judges should court criticism, not stifle it. The surest way to lose the confidence of the people is to render a judgment the effect of which is to suppress the truth, particularly if it affects the judge personally. The people want to respect the judges, and probably do respect them more than they do the officers of any other department; but they cannot be driven to respect them by oppressive and tyrannical judgments. They may, for the time, sullenly obey judgments such as this, but they have a right that is quite as sacred as the individual right of the printer or speaker, and that is the right to hear and know about all their servants, and it will require more than one judgment to effectually deprive them of the right to hear and know about their judges.

The so-called "auditorium case" was pending, and if the judgment had been based upon the article in which that case is mentioned I should have undertaken to show that under the decisions no contempt was in fact committed. But the court has punished the respondent, not because he has undertaken to unduly influence a decision and to prevent the litigants from having a fair trial, but because he has impugned the judges' motives and because when he filed his answer he reasserted his charges.

The court cites one case in support of the proposition that the causes were pending for the purposes of contempt. The general doctrine is that after the judgment is rendered the people are at liberty to discuss it; and this is particularly true where, as under our statute, the court is required, when it announces its judgments, to file an opinion stating its reasons therefor. In the two cases from Colorado the causes were both pending. The writer of the article not only libeled the judges, but he stated facts concerning the parties which had a tendency to influence the community and the judges with respect to their causes. In the Ohio case which we have cited, People vs. Myers, it was expressly held that the defendant was not punished for libel upon the judge, but because he had undertaken to publish matters in the presence of the court and the jurors which might have a tendency to affect the decision in the case. In the Massachusetts case, it will be observed that the newspaper articles published contained facts which, the court remarks, would not be admissible in evidence, and therefore the publisher, inasmuch as such facts were brought to the attention of the court and jury, was held for contempt. In a South Dakota case, on the day after the trial of a criminal case, the publisher condemned the court and its judgment, but the Supreme Court of South Dakota said:

> "The object of contempt proceedings is not to enable the judge, who deems himself aggrieved, to punish the supposed wrongdoer to gratify his own personal feelings, but to vindicate the dignity and independence of the court, and to protect himself and those necessarily connected with it while a matter is pending before it from insolent and contemptuous abuse calculated to intimidate, influence, embarrass, or prevent a fair and impartial trial. If the judge was unjustly assailed by the article in question he had the same, and only the same, remedies for the redress of the wrong which belong to all other citizens. After the conclusion of a trial the right of the press, without fear of punishment by contempt proceedings, in the interest of the public good, to challenge the conduct of the judge, parties, jurors or witnesses and to arraign them at the bar of public opinion in connection with causes that have been fully determined, cannot be denied by a court in any other manner than by the ordinary proceedings in courts of justice. It would be a perversion of the salutary doctrines governing the proceedings of courts and their power to punish for contempts to permit a judge to summon before him and punish by fine and imprisonment one who challenges his learning, integrity or impartiality as a judge in a public newspaper, except when the interests of the state demand it, to vindicate the independence and integrity of the courts and to protect them from publications directly calculated to embarrass, impede, intimidate or influence them in the due administration of justice in proceedings pending before them."

The New Hampshire case mentioned in the opinion as sustaining the decision of the court was a case in which a publisher, while jurors were in attendance upon the court, ready to be summoned to try the cause, published articles reflecting upon one of the parties to the suit and commenting in severe terms upon the prosecution; and the court held that, as the articles had a direct bearing upon the cause that was then pending, and might influence the jurors in the determination of that cause, it was a contempt of court.

In the case State vs. Dunham, reported in 6th Iowa, 245, the court says, speaking of newspaper articles the publication of which have been held to be contempt of an inferior court:

> "Nor are we to be understood as sanctioning the propriety of the course pursued by respondent in his comments and references to the proceedings of the court. If his attack was libelous, then it seems to us that he and the judge assailed should be placed on the same grounds, and 'their common arbiter should be a jury of the country.' No court can or should hope that its opinions and actions can escape discussion or criticism. When a case is disposed of, and the decision announced, such decision becomes public property, so to speak. The construction given to a statute—the reasoning and conclusion of the court upon the facts—all go to the public, and become subject to public scrutiny and investigation. In such cases, it is perfectly competent and lawful for anyone to comment upon the decision, and expose its errors and inconsistencies. If such comments do not correct errors, they will, at least, lead to renewed caution and circumspection upon the part of those whose duty it is to declare the law. It would be a fruitless undertaking in this country—where the freedom of speech and the press is so fully recognized, and so highly prized—to attempt to prevent judicial opinions from being as open to comment and discussion as an opinion or treatise upon any other subject. It is well, and fortunate that it is so. This right is fully recognized in England, and it would be strange if, under our institutions, we should be less tolerant. To investigate and discuss the opinion of the court, and to disobey its mandates or orders, are quite different things. All men may rightfully make their comments, but none should disobey, except upon pain of suffering the penalty attached for violation. And should those thus commenting leave the subject, and impute dishonesty or base motives to the judge, he may be punished by indictment for a libel, he may be answerable in damages in a civil action, or he may be liable to both prosecutions."

But in none of the cases I have cited is language more applicable than that of Mr. Justice Helm in the case of People vs. Green, 7 Colo., 244, where he says:

> "But respondent undertakes to shield himself under the plea of freedom of speech, and a right to criticise. In this country, and in England also, the utmost liberty of speech is guaranteed by statute and enforced by the courts; the right to discuss all matters of public interest or importance is everywhere fully recognized; judicial decisions and conduct constitute no exception to the rule; the judge's official character and his acts in cases fully determined are subject to examination and criticism; in most states the office is elective, and it is proper and right that the people should be informed of the occupant's mental and moral fitness. True, under the guise of criticism in the public press and otherwise, judges are often compelled to endure the sting of misrepresentation and calumny with no other redress than an ordinary civil action; and doubtless it sometimes happens that their efficiency in office is thereby lessened, to the detriment and injury of the public service; but it is widely considered better that these wrongs and injuries should be tolerated than that the sacred liberty of speech, printed or spoken, should be abridged by lodging an arbitrary power to interfere therewith in the hands of the court or judge, so long as such criticism is not designed to influence the mind of the judge in a cause still undetermined."

It is, as Wharton says, "a confession of weakness" for a judge to confess in so conspicuous a way as punishment for contempt that criticism of his opinions handed down may influence a decision on a petition for rehearing if one is filed. And it is "at least as injurious to public justice as is the publication in which the objectionable matter is contained."

But the court makes the plea that it is one of the essential powers of the court—essential to its very existence and absolutely necessary to maintain dignity and command respect. I concede that power to punish for contempt is essential to a proper enforcement of the decrees of a court, for this is recognized by the legislature; but I deny that it is essential and necessary, to maintain dignity and command the respect of the people, that the power should extend to contempts of this character. Instead of commanding respect, it has the opposite effect. The respect must be earned by honest judgments and upright conduct of the judges; and when this arbitrary power is used the people regard it as an element of weakness rather than as an evidence of integrity. The people themselves will rally to the support of the court. The newspapers will be first of all to resist an unwarranted attack upon the court. Public opinion will discountenance unjust assaults, and when the court is unreasonably assailed the persons who thus assail it will in the end suffer. For a court having the confidence and esteem of the public cannot be harmed by unjust criticism.

Lord Erskine, in speaking upon the subject of free speech and fundamental rights, said: "Engage the people by their affections, convince their reason—and they will be loyal from the only principle that can make loyalty sincere, vigorous or rational—a conviction that it is their truest interest, and that their government is for their good. Constraint is the natural parent of resistance, and a pregnant proof that reason is not on the side of those that use it. You must all remember Lucian's pleasant story: Jupiter and a countryman were walking together, conversing with great freedom and familiarity upon the subject of heaven and earth. The countryman listened with attention and acquiescence while Jupiter strove only to convince him; but, happening to hint a doubt, Jupiter turned hastily around and threatened him with his thunder. 'Ah, ha!' says the countryman; 'now, Jupiter, I know that you are wrong; you are always wrong when you appeal to your thunder.'"

So I say. Whenever we exert this arbitrary and despotic power, as pelting and petty officers always do—this power not given by the constitution or by legislative enactment, but taken and exercised because of its alleged necessity—we convince no one; and that unless our judgments are wise and just, and our members are themselves honest and incorruptible, we shall receive the just censure of the public, through the exercise of the right of free speech and through the medium of the printing press, notwithstanding our thunder.

For nearly thirty years the judges of the federal court have held sessions here and have determined great and momentous cases of public import. Yet, in the face of the fact that they have not the power to punish as for contempts the publishers of articles or for spoken words defaming the judges, no one that I now recall has ever attacked the integrity of the judges or impugned their motives. During this time one of the judges has resided here in Denver, and, notwithstanding the fact that he is forbidden by statute to entertain proceedings of this nature, he holds the respect and confidence of the people and the motives of his judgments are not questioned.

In a recent work on constructive contempt by John L. Thomas, former judge of the Supreme Court of Missouri, this subject is so convincingly presented that I shall quote what he says upon the "Law of Necessity" at length. This eminent jurist says:

> "The courts base their power to punish for contempt chiefly upon the law of necessity, which is the law of self-defense. To some extent that may be true. That the courts should have power, by summary process, at the time to keep the peace within their own precincts; to protect themselves and the parties concerned in the business before them from insult and interference, and enforce their orders and judgments, is too axiomatic to admit of proof by argument; but acts or words, done or said or published away from the courts, and not in their presence, stand upon different grounds entirely, because the law of necessity does not apply in these, there being other more appropriate remedies for any wrong growing out of them.
>
> "It is submitted that the law of necessity cannot be invoked in support of the power of the court to try and punish for contempt anyone for the publication of a libel upon them or for other acts not done in their presence. An abstract theory, though in appearance it may be most plausible and beautiful, is sometimes flatly

contradicted by experience and the facts of history, and that is the case with the theory upon which this power is made to rest by its advocates. It is asserted that this power is an essential attribute of constitutional courts only—that a statutory court may be deprived of this essential attribute and yet continue to exist as a court. This is the rule generally applied by the courts. This was done by the Supreme Court of the United States in *ex parte* Robinson, 19 Wall., 505; in the Frew case, 24 W. Va., 416; in the Shepherd case and many others. So that it seems that the law of necessity is the support of some courts and some courts have to stand without that law. The reason for such a distinction is not apparent to the writer. To my mind that so-called law of necessity is no law at all, for if it were no court could exist without it.

"But this is not all. This theory of the law of necessity, as applicable to the punishment for contempt for newspaper publications, is flatly contradicted by the facts of history. The Supreme Court of the United States has never exercised, or attempted to exercise, such a power, though it has at times, for one hundred years or more, been vilified, abused and libeled in an outrageous manner. It has been libelously criticised by the public press for its decisions in the national bank cases, the Dartmouth College case, the Dred Scott case, the reconstruction cases, the legal tender cases, and we all remember the vituperative and libelous attacks made by the press and many public speakers upon that high tribunal for its decision in the income tax and insular cases; and yet the court remained silent and passive; but it still exists in all its vigor. That court, in 1873, in *ex parte* Robinson, decided that under the act of congress of March 2, 1831, the courts inferior to the Supreme Court of the United States have no jurisdiction in a contempt proceeding for acts not committed in their presence; and yet there are no courts of the states of this Union that stand higher or are more respected than the United States Court of Appeals, the United States Circuit Courts and the United States District Courts. The members of the Supreme Court often sit in some of these and aid in the administration of the law in the trial of causes. These courts are absolutely, so far as their power to punish as for a contempt a newspaper publication, at the mercy of the slanderers and libelers of this country, which our Supreme Court stands so much in dread of. And yet those courts continue to exist as courts. And our state Supreme Court, the Court of Appeals and the Circuit Courts never exercised this extraordinary prerogative prior to 1903, and yet they continued to exist. The same may be said of ninety-nine per cent of all the courts in our country. Lords Erskine and Campbell did not think the power essential to a court.

"Speaking upon this very point, the Supreme Court of Illinois in the Storey case, *supra,* quoting from a former decision of the same court, said:

> " 'It does not seem necessary for the protection of courts in the exercise of their judicial power, that this one (contempt for libelous publication), so liable to abuse, should

> be conceded to them. It may be so frequently exercised as to destroy that moral influence, which is their best possession, until finally the administration of justice is brought into disrepute. Respect for courts cannot be compelled. It is the voluntary tribute of the public to worth, virtue and intelligence, and while they are found upon the judgment seat, so long, and no longer, will they retain the public confidence. If a judge be libeled by the public press, he and his assailant should be placed on equal grounds, and their common arbiter should be a jury of the county.'

"The Supreme Court of Wisconsin, speaking on the same subject, in State *ex rel.* vs. Court, 44 L. R. A., 554, said:

> "'Is it necessary that a court should possess this power? We feel bound to hold that, considering the rights of the citizen just referred to, no such power as this is necessary for the due administration of justice. It may be fully admitted that under the common law as administered in England the mere writing contemptuously of a superior court of justice has been declared a constructive contempt. (4 Bl. Com., 285.) We, however, adopted no part of the common law which was inconsistent with our constitution (Cons. Wis. Schedule, sec. 131), and it seems clear to us that so extreme a power is inconsistent with and would materially impair the constitutional right of free speech and free print.'

"To the same effect is the opinion of the court in Mississippi, in *ex parte* Hickey, 4 Smedes & M., 751, and it has been the firm conviction of the people of this country for over a hundred years that this power is not necessary, but that it is a power so arbitrary and so liable to abuse that it ought not to be intrusted to the court, but that cases involving the abuse of freedom of speech and the press ought to be tried by an impartial jury before courts that have and can have no personal interest in the result. Hence this power in this respect, not being based on the law of necessity, can be taken away from or not conferred on the courts at the will of the legislature. Whether the power to protect themselves from insult and keep the peace in their own precincts and enforce their own judgments can be taken away from the courts or given to some other judicial tribunal has not arisen in this country yet, for no legislature has ever, up to this time, attempted to go that far, and until such an attempt is made so improbable a contingency need not enter into the discussion.

"Our contempt statute not only recognizes, but, in terms, confers the power on the courts to punish for contempts committed in their presence, and for refusing to obey the process or orders of the court, and beyond these the law of necessity, if it exists at all, does not extend."

This plea of necessity has always been urged as the reason for the exercise of arbitrary power not sanctioned by law. All tyrants take refuge behind it. It is the reason urged for misgovernment everywhere. The constitution is ignored and the statutes disregarded mainly upon the plea of necessity. The power of judging of the necessity is, by this same doctrine of necessity, as a matter of course lodged in the person making the plea.

Judge Thomas further says, page 41:

> "Those who opposed proceedings, based on attachment for contempt of court for newspaper publications, did not deny that courts ought to be protected against unjust and malicious criticism, but they did deny the propriety, if not the right of the judge to try any issue in which his personality must of necessity more or less enter, and which, they felt, can but influence his decision. This objection, however, applies only where the contempt proceeding is for criticism of the judge by print, writing or picture, and does not apply to the enforcement of the orders of the court, for in this the personality of the judge does not enter in the slightest degree, and hence personal bias in such cases can have no appreciable influence over the decision of a just judge. Lord Erskine, at the close of his great career, gave it as his opinion that there ought to be a jury trial when a person is charged with libeling a court or judge; and Lord Campbell, one of the chief justices of England, in a note to the case of Rex. vs. Almond, Wilm. Op., 243, third volume of his Lives of the Lord Chief Justices, 190, says: 'In consequence of the resignation of Sir Fletcher Norton, who as attorney general had made the motion, it (the Almond case for contempt) was dropped after cause shown while the court was considering its judgment; and although there can be no doubt as to the power to proceed by attachment in such a case—if a prosecution for libel on judges be necessary—the preferable course is to proceed by information or indictment, so as to avoid placing them in the invidious situation of deciding where they may be supposed to be parties.' "

The court says that the case of Hughes vs. The People is authority for holding, as it does, "that the truth of the matter charged as contemptuous is not justification to the charge of contempt." The court further says that the court very briefly disposed of the offer of Hughes to prove the truth of his charges, and quotes the following language used by the court:

> "It is further assigned for error that the court rejected testimony offered to prove the truth of the matter charged in the writings. After what we have already said it is scarcely necessary to add that this assignment is untenable."

I cannot place such construction on this portion of Justice Stone's opinion. He had already said:

> "A contempt consists as well in the manner of the person committing it as in the subject matter of its foundation; matters which, if true, would in their very nature be scandalous, may be presented, hinted at or brought to the attention of the court in so respectful a manner that no judge would ever think to construe a contempt therefrom; while, on the other hand, it is easy to see, when under the guise and pretense of setting out privileged and necessary matters, circumstances are detailed and scandalous and insulting charges and innuendoes are made and insinuated upon pretended 'information and belief' in a manner that bears the unmistakable earmarks of malice and deliberate contempt.
>
> "These remarks, we think, will indicate sufficiently clear the path which each attorney is expected to advise and follow in choosing the language he employs in papers filed in court, as well as in speech addressed directly to the judge."

This explains the words quoted as declaring that the proof of the truth of the matter charged in an alleged contemptuous paper filed in the court is not a justification. Taken all together it is not authority for the opinion in this case, but is simply a holding that the attorney who presents a paper to a court must use language, if possible, that is not scandalous; and that he should, rather than relate a plain, unvarnished tale, hint at such matters and gloss them in such a way that a discriminating judge will not deem the language contemptuous. But it is not possible to use this case as authority for holding that under no circumstances is the truth a justification; for, suppose that an attorney has merely hinted at a scandalous matter, and the judge has cited him for contempt, and as a justification the attorney offers to prove the truth. There is positively nothing in the opinion which would justify the court in denying the attorney the right to prove such matters in justification.

In the case Mullin vs. People, 15 Colorado, 437, Mullin had prepared a petition for a change of venue, wherein he set forth, among other things, that the wife of the judge had, just before the trial of a certain cause, told him that she must return home at once and see the judge and arrange with him to have Mrs. Davis win her case; that Mrs. Davis did win the case; and that, as he was interested in the same litigation, although in another suit, he feared that the judge would be prejudiced against him and he asked to have the venue of the cause changed. After stating that the statute requires the petitioner, in cases where the change of venue is asked on account of the prejudice of the judge, to set forth the facts upon which he bases his fears that he will not receive a fair trial, Mr. Justice Hayt, who delivered the opinion of the court, said:

> "Assuming, then, for the purposes of this case, that the wife of the presiding judge made the statement attributed to her, plaintiff in error had the undoubted right to embody such statement in his petition for a change of venue without subjecting himself to being punished for contempt. The principal ground relied upon to sustain the action of the court below therefore fails. Had it been charged that the affidavit was false in this respect, and that such false statements were made willfully and maliciously, as argued, a different case would have been presented."

This case seems to hold that in a petition for change of venue the party seeking the change may set out the reasons upon which he bases his fears that he will not receive a fair trial, and that, if the statements therein contained are true, he is not subject to punishment for contempt.

John Peter Zenger was tried for a defamatory publication of certain public officials in New York in 1735. Andrew Hamilton defended him. Speaking of the effect of censuring those in power, Hamilton said:

> "It is said that it brings the rulers of the people into contempt so that their authority is not regarded, and so that in the end the laws cannot be put into execution. These, I say, and such as these, are the general topics insisted upon by men in power and by their

> advocates. But I wish it might be considered at the same time how it often has happened that the abuse of power has been the primary cause of these evils, and that it was the injustice and oppression of these great men which has commonly brought them into contempt with the people. The craft and art of such men are great, and who that is the least acquainted with history or with law can be ignorant of the specious pretenses which have often been made use of by men in power to introduce arbitrary power and destroy the liberties of a free people? * * *
>
> "But, to conclude, the question before the court and you, gentlemen of the jury, is not of small nor private concern; it is not the cause of a poor printer nor of New York alone which you are now trying. No! It may, in its consequences, affect every free man that lives under a British government on the main continent of America. It is the best cause; it is the cause of liberty; and I make no doubt but your upright conduct this day will not only entitle you to the love and esteem of your fellow citizens, but every man who prefers freedom to a life of slavery will bless and honor you as men who have baffled the attempt of tyranny, and, by an impartial and uncorrupt verdict, have laid a noble foundation for securing to ourselves, our posterity and our neighbors that to which nature and the laws of our country have given us a right—the liberty of exposing and opposing arbitrary power (in these parts of the world, at least) by speaking and writing truth."

Through the efforts of Hamilton, Zenger was acquitted in spite of the judge's efforts; and this at a time when the truth was not a defense to such an action. Gouverneur Morris is said to have stated that, instead of dating American liberty from the Stamp act, he traced it to the persecution of Zenger; because that event revealed the philosophy of freedom, both of thought and speech as an inborn human right, so nobly set forth in Milton's speech for the liberty of unlicensed printing.

Harry Croswell, the publisher of a newspaper at Hudson, N. Y., was convicted for libeling Thomas Jefferson, the then president of the United States. The case was taken to the Supreme Court. It has attracted great attention, not only because of the importance of the questions raised, but because of the eminence of court and counsel. The lower court had refused to instruct the jury that it was the judge of the law and fact, and that the truth was a justification. The case is reported in 3 Johnson's Cases, page 323. In opening the case, counsel for Croswell said:

> "The opposite doctrine, which maintains that a writing is equally libelous, whether true or false, originated in a polluted source, the despotic tribunal of the star chamber. (Moore, 627, 5 Co., 125.) * * * The star chamber had no authority to alter the common law. Our ancestors, when they emigrated to this country, brought with them the common law as their inheritance and birthright, and one of the earliest acts of our colonial legislature was to assert their claim to the enjoyment of the common law. * * * The doctrine which will be contended for on the other side, that the truth cannot be given in evidence, and is in no case to justify libel, although it should be promulgated with the purest motives, is repugnant to the first principles of policy and justice and contrary to the genius of a free representative public. Freedom of discussion and a freedom of the press, under the guidance and sanction of truth, are essential to the liberties of our country, and to enable the people to select their rulers with discretion and to judge correctly of their merits."

General Alexander Hamilton appeared for Croswell. He said, in the closing argument:

> "The liberty of the press consists, in my idea, in publishing the truth, from good motives and for justifiable ends, though it reflect on government, magistrates or individuals. If it be not allowed it excludes the privilege of canvassing men and our rulers. It is in vain to say you may canvass measures. This is impossible without the right of looking to men. To say that measures can be discussed, and that there shall be no bearing on those who are the authors of those measures, cannot be done. The very end and reason of discussion would be destroyed. Of what consequence to show its object? Why is it thus to be demonstrated, if not to show, too, who is the author? It is essential to say, not only that the measure is bad and deleterious, but to hold up to the people who is the author, that, in this our free and elective government, he may be removed from the seat of power. If this be not done, then in vain will the voice of the people be raised against the inroads of tyranny. * * * But if, under the qualifications I have mentioned, the power be allowed, the liberty for which I contend will operate as a salutary check. In speaking thus for the freedom of the press, I do not say there ought to be an unbridled license, or that the characters of men who are good will naturally tend eternally to support themselves. I do not stand here to say that no shackles are to be laid on this license.
>
> "I consider this spirit of abuse and calumny as the pest of society. I know the best of men are not exempt from the attacks of slander. Though it pleased God to bless us with the first of characters, and though it has pleased God to take him from us and this band of calumniators, I say that falsehood eternally repeated would

have affected even his name. Drops of water, in long and continued succession, will wear out adamant. This, therefore, cannot be endured. It would be to put the best and the worst on the same level.

"I contend for the liberty of publishing truth, with good motives and for justifiable ends, even though it reflect on government, magistrates or private persons. I contend for it under the restraint of our tribunals. When this is exceeded let them interpose and punish. From this will follow none of those consequences so ably depicted. When, however, we do look at consequences, let me ask whether it is right that a permanent body of men, appointed by the executive and in some degree always connected with it, should exclusively have the power of deciding on what shall constitute a libel on our rulers, or that they shall share it united with a changeable body of men chosen by the people? Let our juries be selected, as they now are, by lot. But it cannot be denied that every body of men is, more or less, liable to be influenced by the spirit of the existing administration; that such a body may be liable to corruption and that they may be inclined to lean over towards party modes. No man can think more highly of our judges, and I may say personally so of those who now preside, than myself; but I must forget what human nature is and how her history has taught us that permanent bodies may be so corrupted, before I can venture to assert that it cannot be. As then it may be, I do not think it safe thus to compromise our independence. For though, as individuals, the judges may be interested in the general welfare, yet if once they enter into these views of government their power may be converted into an engine of oppression. It is in vain to say that allowing them this exclusive right to declare the law on what the jury has found can work no ill; for, by this privilege, they can assume and modify the fact so as to make the most innocent publication libelous. It is, therefore, not a security to say that this exclusive power will but follow the law. * * * Passages have been adduced from Lord Mansfield's declarations to show that judges cannot be under the influence of an administration. Yet still it would be contrary to our own experience to say that they could not. I do not think that even as to our own country it may not be. There are always motives and reasons that may be held up. It is therefore still more necessary here to mingle this power than in England. The person who appoints there is hereditary. That person cannot alone attack the judiciary; he must be united with the two houses of lords and of commons in assailing the judges. But with us it is the vibration of party. As one side or the other prevails, so of that class and temperament will be the judges of their nomination. Ask any man, however ignorant of principles of government, who constitute the judiciary; he will tell you the favorites of those at the head of affairs. According, then, to the theory of this, our free government, the independence of our judges is not so well secured as in England. We have here reasons for apprehension not applicable to them. We are not, however, to be influenced by the preference to one side or the other. But of which side soever a man may be, it interests all to have the question settled and to uphold the power of the jury, consistently, however, with liberty, and also with legal and judicial principles, fairly and rightly understood. None of these impair that for which we contend—the right of publishing the truth, from good motives and justifiable ends, though it reflect on government, on magistrates, or individuals.

"Some observations have, however, been made in opposition to these principles. It is said that, as no man rises at once high into office, every opportunity of canvassing his qualifications is afforded, without recourse to the press; that his first election ought to stamp the seal of merit on his name. This, however, is to forget how often the hypocrite goes from stage to stage of public fame, under false array, and how often, when men obtain the last object of their wishes, they change from that which they seemed to be; that men, the most zealous reverers of the people's rights, have, when placed on the highest seat of power, become their most deadly oppressors. It becomes, therefore, necessary to observe the actual conduct of those who are thus raised up.

* * * * * * *

"I affirm that, in the general course of things, the disclosure of truth is right and prudent when liable to the checks I have been willing it should receive as an object of animadversion. It cannot be dangerous to government, though it may work partial difficulties. If it be not allowed they will stand liable to encroachments on their rights. It is evident that if you cannot apply this mitigated doctrine, for which I speak, to the cases of libels here, you must forever remain ignorant of what your rulers do. I never can think this ought to be; I never did think the truth was a crime; I am glad the day has come in which it is to be decided, for my soul has ever abhorred the thought that a free man dared not speak the truth; I have forever rejoiced when this question has been brought forward.

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"It is impossible to say that to judge of the quality and nature of an act the truth is immaterial. It is inherent in the nature of things that the assertion of truth cannot be a crime. In all systems of law this is a general axiom, but this single instance, it is attempted to assert, creates an exception, and is therefore an anomaly. If, however, we go on to examine what may be the case that shall be so considered, we cannot find it to be this.

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"It is true that the doctrine originated in one of the most oppressive institutions that ever existed; in a court whose oppressions roused the people to demand its abolition, whose horrid judgments cannot be read without freezing the blood in one's veins. This is not used as declamation, but as argument. If doctrine tends to trample on the liberty of the press, and if we see it coming from a foul source, it is enough to warn us against polluting the stream of our own jurisprudence. It is not true that it was abolished merely for not using the intervention of juries, or because it proceeded *ex parte*—though that, God knows, would have been reason enough—or because its functions were discharged by the court of king's bench. It was because its decisions were cruel and tyrannical; because it bore down the liberties of the people, and inflicted the most sanguinary punishments. It is impossible to read its sentences without feeling indignation against it. This will prove why there should not be a paramount tribunal to judge of these matters."

Mr. Justice Kent, in an opinion, sustained General Hamilton and adopted his views. He said in part:

"Mr. Barrington (Observations on the Statutes, 68) has given us a part of a curious letter, written at that time by the dean of St. Paul's, from which we may infer his alarm and disgust at the new libel doctrines of the star chamber. 'There be many cases,' he observes, 'where a man may do his country good service by libeling; for where a man is either too great or his vices too general to be brought under a judiciary accusation, there is no way but this extraordinary method of accusation.' * * *

"It appears clear, from this historical survey, that the doctrine now under review originated in the court of star chamber, and was introduced and settled there about the beginning of the reign of James I. (Breverton's Case, 2 Jac., 1, and the case in 5 Co., 125, 3 Jac. 1, both settled the rule.) It was, no doubt, considered at that time as an oppressive innovation, but opposition must have been feeble to a court whose action and whose terrors were then at the greatest height, and which exercised its superlative powers (as Hudson terms them) with enormous severity. The principle was, however, received in after times with jealousy and scrutiny, as coming without the sanction of legitimate authority, and it was not to be expected that a people attached to the mild genius of the common law, of which trial by jury in criminal cases is one of its most distinguished blessings, would willingly receive the law and limits of the press from the decrees of so odious and tyrannical a jurisdiction. * * *

"The first American congress, in 1774, in one of their public addresses (Journals, vol. 1, p. 57), enumerated five invaluable rights, without which a people cannot be free and happy, and under the protecting and encouraging influence of which these colonies had hitherto so amazingly flourished and increased. One of these rights was the freedom of the press, and the importance of this right consisted, as they observed, 'besides the advancement of truth, science, morality and arts in general, in its diffusion of liberal sentiments on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honorable and just modes of conducting affairs.' * * *

"I have thus shown that the rule denying permission to give the truth in evidence was not an original rule of the common law.

The ancient statutes and precedents, which are the only memorials to which we can resort, all place the crime on its falsity. The court of star chamber originated the doctrine, and it was considered an innovation. When it was brought into a court of common law it was resisted and denied; the court dared not practice upon it, and the jury gave it their negative. Lord Holt totally disregarded the rule, in the case of Fuller; and it did not become an express decision of a court of common law till Franklin's case, in 1731; and there the counsel made a zealous struggle against it, as new, dangerous and arbitrary. In the trial of Horne, Lord Mansfield laid the rule aside, and the counsel for the crown rejoiced at an opportunity to meet the defendant upon the merits of the accusation. In 1792 it was made a questionable point in the house of lords, and one of the highest law characters in the house seems to have borne his testimony against it. I feel myself, therefore, at full liberty to examine this question upon principle, and to lay the doctrine aside, if it shall appear unjust in itself, or incompatible with public liberty and the rights of the press. * * *

"I adopt in this case, as perfectly correct, the comprehensive and accurate definition of one of the counsel at the bar (General Hamilton), that the liberty of the press consists in the right to publish, with impunity, truth, with good motives and for justifiable ends, whether it respects government, magistracy or individuals."

In the case of King vs. Root, 4 Wend., 114, the trial court instructed the jury upon the liberty of the press, as follows:

> "A vigilant watch should be kept over the editors of our journals to prevent them becoming vehicles for the indulgence of private resentment. Yet, however aggravated the practice of traducing character so openly and virulently through the press may become, you must be cautious not to let your anxiety to check a great evil lead you to do a great wrong to these defendants, * * * and in seeking to restrain the licentiousness of the press, you will be careful not to trammel fair discussion nor punish the truth, however painful it may be to those of whom it is published."

The judgment was affirmed and this instruction was approved.

Horace Greeley was defendant in a suit for defamation. He pleaded that the articles published by him were true. In passing upon a preliminary motion, the court said:

> "The press is allowed to comment fully and freely upon public characters, from the president down, and to utter those things with the utmost freedom; to charge official men with incompetency and imbecility, with ignorance or corruption; to charge judges with ignorance, incompetency or venality, and the proof of any of these

ROBERT WILBUR STEELE
(From photograph, 1900)

> allegations is a perfect defense. But the press has no right, under its guaranteed freedom, to publish what is not true." (Littlejohn vs. Greeley, 13 Abbott's Pr., 41.)

In the case of Negley vs. Farrow, 60 Md., 158, at page 176, the court, through Robinson, justice, says:

> "No one denies the right of the defendants to discuss and criticise boldly and fearlessly the official conduct of the plaintiff. It is a right which in every free country belongs to the citizen, and the exercise of it, within lawful and proper limits, affords some protection at least against official abuse and corruption. But there is a broad distinction between fair and legitimate discussion in regard to the conduct of a public man and the imputation of corrupt motives by which that conduct may be supposed to be governed. And if one goes out of his way to asperse the personal character of a public man and to ascribe to him base and corrupt motives, he must do so at his peril, and must either prove the truth of what he says, or answer in damages to the party injured."

In the case of State vs. Frew, 24 West Virginia, 416, Mr. Justice Snyder, one of the justices of the court, said:

> "Having thus shown that the court has the power to punish for contempts, it must not be overlooked that this power can be justified by necessity alone, and should rarely be exercised, and never except when the necessity is plain and unmistakable. It is not given for the private advantage of the judges who sit in the court, but to preserve to them that respect and regard, of which courts cannot be deprived and maintain their usefulness. It is given that the law may be administered fairly and impartially, uninterrupted by any influence which might affect the rights of the parties or bias the minds of the judges, that the court may command that respect and sanctity so essential to make the law itself respected, and that the streams of justice may be kept pure and uncorrupted. * * * The public have a profound interest in the good name and fame of their courts of justice, and especially of the courts of last resort. Everything that affects the well-being of organized society, the rights of property, and the life and liberty of the citizen, is submitted to their final decision. The confidence of the public in the judiciary should not be wantonly impaired. It is all-important to the due and efficient administration of justice that the courts of last resort should possess in a full measure the entire confidence of the people whose laws they administer. All good citizens will admit that he who willfully and wantonly assails the courts by groundless accusations, and thereby weakens the public confidence in them, commits a great wrong, not alone against the courts, but against the people of the state. It must be and is cheerfully conceded that public journals have the right to criticise freely the acts of all public officers—executive, legislative and judicial.

> It is a constitutional privilege that even the legislature cannot abridge. But such criticism should always be just and with a view to promote the public good. Where the conduct of a public officer is willfully corrupt, no measure of condemnation can be too severe, but when the misconduct, apparent or real, may be simply an honest error of judgment the condemnation ought to be withheld or mingled with charity."

This is one of the cases cited by the court in support of its position in this case. Yet by the use of the adverb wantonly and of the adjective groundless it would seem that, in the opinion of this justice, if the accusation were not wantonly made and were not groundless, no contempt would have been committed. He also appears to favor severe condemnation of those public officers who are willfully corrupt. The justices were careful to state that they had been falsely charged, and one of the judges insisted that the attorneys should have been fined because they must have known that the answer filed was false.

My brother Gunter relies upon the case *in re* Moore *et al.*, 63 North Carolina, 397, decided in the year 1869, as supporting one of the positions taken by the court in this case. In that case more than one hundred members of the bar signed and published a protest, entitled "A Solemn Protest of the Bar of North Carolina Against Judical Interference in Political Affairs." The protest declared, among other things, that

> "Active and open participation in the strife of political contests by any judge of the state, so far as we recollect, or tradition or history has informed us, was unknown to the people until the late exhibitions. To say that these were wholly unexpected, and that a prediction of them by the wisest among us would have been spurned as incredible, would not express half our astonishment, or the painful shock suffered by our feelings when we saw the humiliating fact accomplished. * * * Many of us have passed through political times almost as excited as those of today; and most of us, recently, through one more excited; but never before have we seen the judges of the Supreme Court, singly or *en masse,* moved from that becoming propriety so indispensable to secure the respect of the people, and, throwing aside the ermine, rush into the mad contest of politics under the excitement of drums and flags. From the

unerring lessons of the past we are assured that a judge who openly and publicly displays his political party zeal renders himself unfit to hold 'the balance of justice,' and that whenever an occasion may offer to serve his fellow partisans he will yield to the temptation and the 'wavering balance' will shake."

This article was held to be libelous because false, and contemptuous because libelous. The court said:

> "The only allegation of fact on which this 'solemn protest' rests is that 'the judges, single and *en masse*, did rush into the mad contest of politics under the excitement of drums and flags.' Is this allegation of fact true or is it false? There is no pretense that it is true. It is said this is a figure of speech, suggested by something that was expected to occur but never did occur; so the allegation of fact is false and the inference drawn from it is also false. In our judgment the paper is libelous and 'doth tend to impair the respect due to the authority of the court.'"

No case from America, since the constitutional provisions concerning free speech and the printing press have been in force, has been cited in which a judge has undertaken to punish as for contempt statements such as these. A redeeming feature of this case is that the respondents did not retract or apologize, and were not punished; and that the court held that to publish such an article is not contempt unless it is false.

In the Wyatt case the court held that the legislature had not undertaken to control the procedure in criminal contempt because the statute on the subject was contained in the civil code. It recommended, however, a substantial compliance with the code provisions in cases of criminal contempt.

In the Stapleton case the court did not declare that the legislature could not legislate upon the subject of contempt, but expressly declares that, as it had not done so, the court had the common law power of punishing for constructive contempt. Mr. Justice Elliott said, quoting from the Hughes case:

> "Such a statutory enumeration of causes as is found in our code, when applied to the ever varying facts and circumstances

> out of which questions of contempt arise, cannot be taken as the arbitrary measure and limit of the inherent power of a court for its own preservation, and for that proper dignity of authority which is essential to the effective administration of law.
>
> "The Hughes case was based upon the Code of 1877, which was repealed in 1887. Chapter 30 of the present code is, however, a substantial re-enactment of the former provisions relating to contempt proceedings. These provisions were re-enacted more than six years after the announcement of the decision in the Hughes case. Thus by a well known rule of statutory construction it must be presumed that the legislature had knowledge of and were satisfied with the construction given to such provisions, and so re-enacted them without change. (Harvey vs. Travelers' Insurance Company, *ante*, 354.) Moreover, neither in the code of 1877 nor in the present code are there any negative or other qualifying words limiting contempts to such causes as are therein specified."

This language cannot be misunderstood, and the court has, in this case, in effect, overruled the Stapleton case, for it says:

> "We do not desire to intimate by the excerpt from People vs. Stapleton that it would be competent for the legislature to limit the power of courts, created by the constitution, in reference to either civil or criminal contempt."

Instead of accepting the decisions of this court as a warning that the court had already taken all the power necessary for its existence, it goes beyond that and intimates, if it does not hold, that the subject of contempt is one over which the legislature has no control. Colorado has thus joined the group of states consisting of Arkansas, West Virginia, Virginia, Georgia and Missouri in declaring that necessity—a necessity essential to the very existence of the court—requires that the legislature should not legislate upon the subject of contempt. How the federal courts and the courts of the other thirty-nine states have managed to exist for lo! these many years without this essential power is not explained in the opinion.

I shall not discuss the proposition that the common law powers cannot be taken from the courts created by the constitution by legislative enactment, further than to say that, as the constitution that created the court adopted the common law only until altered or repealed by the general assembly, it would seem to follow that it is within the power of the legislature to take away any power not expressly granted by the constitution.

Although the court is sustained, in part, by the courts of the states mentioned, *this court stands alone in holding that the truth is immaterial.* In Georgia and Virginia the contempt was of an entirely different character. In Arkansas the court says that one is punishable for contempt who wantonly attempts to obstruct public justice; and in West Virginia the court speaks of groundless accusations made against the court as being contemptuous, while in Missouri the court squarely holds that the power to punish is limited to those who tell an untruth. The doctrine that "the truth is immaterial" comes, as Kent and Hamilton say, from a polluted source, the obnoxious star chamber, and it was undoubtedly the cowardly conception of corrupt officials as a means of shielding themselves from exposure, and why it should be revived in this day and generation is beyond my understanding.

The court disposes of the contention of the respondent that he should not be punished for publishing the truth by saying:

> "State vs. Shepherd, 147 Mo., 244, has been cited as *contra* our conclusion. The question is not presented by the answer of the respondent in that case, nor is its sufficiency as a defense considered or passed upon by the court. No case has been found which sustains, or tends to sustain, the contention of counsel."

It is true that the answer of the respondent did not justify by alleging the truth of the charges, but I can place no other construction upon the language of the court than that, in the judgment of that court, proof of the truth of the alleged contemptuous articles is a perfect defense.

As my brother Gunter and I have placed constructions upon the Missouri case that are diametrically opposed to each other, I shall quote from the opinion in that case the language upon which I base my conclusion that the court held that the truth of the charges made is a justification in a proceeding for contempt. The publisher of a newspaper had charged, in effect, that the judges of the Supreme Court had been bribed by the Missouri Pacific Railroad Company to render a certain judgment in its favor. The article stated, among other things, that

> "As the capsheaf of all this corruption in high places, the Supreme Court has, at the whipcrack of the Missouri Pacific Railroad, sold its soul to the corporations."

Further, that

> "The victory of the railroad has been complete, and the corruption of the Supreme Court has been thorough. It has reversed and stultified itself in this case until no sane man can ever have any other opinion but that the judges who concurred in the opinion dismissing the Oglesby case have been bought in the interest of the railroad."

The court then proceeds:

> "If these charges are true, the persons who are thus charged should be prosecuted and removed from office. On the other hand, anyone who makes such charges should be prepared to make some sort of a decent showing of their truth. Instead of standing ready to prove the truth of the charges, the defendant, when called into court, neither asserts the truth of the charges, nor does he accept the challenge of the attorney general to introduce any evidence whatever of their truth. * * * In other words, the defendant has grossly, indecently and cruelly vilified and scandalized every department of the government under which he lives, and which affords him protection for his life, liberty and property, and, when challenged to make his words good, he consummates his offending by failing absolutely to produce one word of testimony to show that he told the truth, and, instead of making the 'amende honorable' by withdrawing the charges and apologizing like a man, he seeks to escape punishment by challenging the jurisdiction of this court."

At another place in the opinion the court says:

> "The offense of *scandalum magnatum* has not existed in this country since the revolution, but anyone, of whatever rank or station in life, stands upon the same footing before the law and is

entitled to the same protection for his life, his liberty, his property and his reputation. In the eyes of our constitution and laws, every man is a sovereign and ruler, and a freeman, and has equal rights with every other man. * * * Every man may lawfully do what he will, so long as it is not *mala in se* or *mala prohibita*, or does not infringe upon the equally sacred rights of others. Every man may speak and write what he will, so long as he tells the truth, but no man has any more right today to bear false witness against his neighbor than he had in the days of Moses."

At another place the court says:

"But the press has no greater liberty in this regard than any citizen. Newspapers and citizens have the same right to tell the truth about anybody or any institution. Neither has the right to scandalize anyone or any institution."

And again:

"Good people obey the laws, slander no one and speak the truth. Others must do so or be punished. Upon no other basis could good government rest or the rights of the people be protected. * * * This is the true rule. The liberty of the press means that anyone can publish anything he pleases, but he is liable for the abuse of this liberty. If he does this by scandalizing the courts of his country he is liable to be punished for contempt. If he slander his fellow men he is liable to a criminal prosecution for libel, and to respond civilly in damages for the injury he does to the individual. In other words, the abuse of the privilege consists principally in not telling the truth."

And, quoting from a New York case, it says:

"It has been urged upon you that the conductors of the public press are entitled to peculiar indulgences and have special rights and privileges. The law recognizes no such peculiar rights, privileges or claim to indulgence. They have no rights but such as are given to all. They have just the same right that the rest of the community have, and no more. They have the right to publish the truth, but no right to publish falsehood to the injury of others with impunity. It is the liberty of the press that is guaranteed, not the licentiousness. It is the right to speak the truth, not the right to bear false witness against your neighbor."

And, quoting the following from an English case:

"Some people are very credulous, especially in politics, and can readily believe any evil of their opponents. There must, therefore, be some foundation in fact for the charges made. * * * The courts of other states have held that it is libelous to charge an officer with having taken a bribe, or with corruption, or with want of integrity. In such cases the publisher must stand ready to prove the truth of his charges or he will not go unwhipped of justice."

Here the court cites a great number of cases in support of its position. And, in speaking of the case the decision of which called forth the newspaper comment, the court said:

> "No one believed or dared to charge another with dishonesty of opinion or action, and there was no foundation in fact and in truth for any such charges. There was, therefore, no legal justification or excuse for the article that was published by the defendant. He did not dare attempt to prove or claim that it was true, but stood mute as to that, and sought to escape punishment on other grounds which were untenable. He was therefore guilty of malice. He abused the liberty of the press and made himself liable therefor."

And, finally, in closing, the court says:

> "What is herein said in no manner whatever conflicts with what was said in Marx & Haas Jeans Clothing Company vs. Watson, 168 Mo., 133. That was a suit in equity to enjoin a boycott, and it was held that injunction would not lie to restrain the utterance of a libel or slander, or to restrain free speech. It was held there, as it is here, that everyone may speak, write or publish whatever he will, but is responsible for the abuse of the privilege. That case, as well as this, holds that the courts cannot prevent a man telling an untruth about another, but their power is limited to punishing him if he does so."

I must confess my utter inability to understand ordinary English words, if the court did not declare that the defendant presented no legal justification or excuse for the articles published, *because he failed to establish the truth.*

The court says:

> "But no case has been presented which sustains, or tends to sustain, respondent's contention that the truth is a justification."

I have presented several, and none have been cited to the contrary. And it seems to me that it is contrary to the American spirit to punish a man for telling the truth. That no case is presented in which the answer of the respondent alleges the truth as a justification, and the court has discharged him because he proved the truth, I concede. In the cases cited where charges were made against the appellate tribunal, the court carefully calls attention to the fact that the charges are false and makes explanation of its conduct.

The law up to this time has been such that no judge would, probably, cite one for publishing truthful charges concerning him, unless he was satisfied that the respondent could not or would not undertake to prove his charges. This may account for there being no case just like the one under consideration.

I have always understood that the truth was a perfect defense to actions of this kind; that it was not only a right every person had to disclose the fact, but that it was a duty he owed to his country to proclaim abuses when found to exist in public office—"For truth can be outraged by silence quite as cruelly as by speech."

An exception is said to exist in favor of judges, but I know of no good reason why the judicial department of the government should be screened from the searchlight of truth, while the officers of the other departments remain in its glare.

The court says the "weight of authority" sustains the law as so announced by the court; and cites State vs. Merrill, State vs. Frew, Myers vs. State, Sturoc's case, State vs. Shepherd, and 7 American and English Encyclopedia of Law and cases. This statement I must flatly dispute. Judge Thomas, in his recent work on Constructive Contempts, says:

> "Out of forty-five states the courts of only two—Arkansas and West Virginia—have set aside statutes in order to obtain jurisdiction to punish as for a contempt a libelous newspaper publication, * * * and two other courts—Georgia and Virginia—have held that the court's inherent power to punish contempts cannot be limited by legislative power; but these cases did not involve newspaper publications." * * * "The courts in these four states have gone farther than the courts in any other state, and they stand alone in holding contempt statutes containing negative or restrictive words unconstitutional in order to exercise this extraordinary power. In these cases the question of the unconstitutionality of the statute was squarely presented by the record, and decided by the courts.
>
> "Another fact must not be overlooked in the examination of this question, and that is, no court in this country, or any country for that matter, ever set aside a statute in order to acquire jurisdiction

in a contempt case until the Supreme Court of Arkansas, in the Morrill case, in 1855, did that."

So that, as this insignificant number of cases cannot be regarded as sustaining the weight of authority, it must be that state pride was a very important element in inducing the statement from my brother Gunter.

I do not contend that one who in open court charges a judge with corruption may justify his act by proof that his charge is true, but I do contend that when the alleged contempt consists of the publication in a newspaper of defamatory accusations such publication is not contempt, but libel, and that the constitution intervenes to prevent that offense from being tried by judges who are smarting under a sense of injury; and that when a court takes cognizance of a newspaper libel, either directly or remotely connected with a pending case, upon the ground that the publication was calculated and intended to influence its action, it ought, nevertheless, to prosecute and convict only for the contempt, and not for the libel; and that, so far as the libel is concerned, the truth is always a justification, no matter what the court is pleased to call the offense.

I do not approve of the decision in State vs. Shepherd, from which I have quoted, in so far as it declares the court's jurisdiction; but I regard it as very much nearer correct than the decision in this case. For in that case the defendant was punished for publishing a false charge against the court, while in this case it is held that a person is guilty of contempt even though the charges made be true.

The theory upon which is based the doctrine that the truth is not a defense is stated by counsel for the people in the case People vs. Stewart, *supra*, when he said, referring to the provision of the constitution which provides that the truth may be given in evidence:

> "This provision of the constitution only relates to criminal prosecutions, and the truth may be given in evidence in such prose-

> cutions; but in a proceeding for contempt this cannot be done, and ought not to be, because it is not considered as affecting the individual, but the court. Whether the publication was true or false is immaterial, because the court, as a court, must be protected, whether right or wrong."

But this doctrine, though captivating, was repudiated by the court and has found lodgment in none of the reports of this country, and I trust its lodgment here is but temporary. Even in Arkansas, where we find the first decision declaring the inherent power of the court to punish for this character of contempts, and holding the legislative enactment void which regulated the punishment and procedure, this doctrine does not germinate, for this language appears in Neal vs. State, 9 Ark., 259:

> "But while the aegis of the law is so thrown over the judge, it finds no pleasure in him when he proves recreant to the high trust reposed in him, for, in the language of one of its oracles (Sergeant Hawkins), 'If a judge will so far forget the honor and dignity of his post as to turn solicitor in a cause which he is to judge, and privately and extra judicially tamper with witnesses, or labor jurors, he hath no reason to complain if he be dealt with according to the capacity to which he so basely degrades himself."

In repudiating the doctrine the Illinois court said:

> "If a judge be libeled by the public press he and his assailant should be placed on equal grounds, and their common arbiter should be a jury of the country."

And, again, in People vs. Storey, *supra*, the court said:

> "The theory of government (British) requiring royalty to be invested with an imaginary perfection which forbids question or discussion is diametrically opposed to our theory of popular government, in which the utmost latitude and freedom of discussion of business affecting the public and the conduct of those who fill positions of public trust, that is consistent with truth and decency, is not only allowable but essential to the public welfare."

This doctrine does not thrive in Pennsylvania, for we find the Supreme Court of that state asserting, in *ex parte* Steinman, *supra:*

> "We need not say that the case is altered and that it is now the right and duty of a lawyer to bring to the notice of the people

who elect the judge every instance of what he believes to be corruption or partisanship."

Judge Thompson was not seduced by the pleasing doctrine, for he says:

> "It is, moreover, to be observed that in states where, as in Colorado, the people elect their judges, it is in accordance with the spirit of our institutions that the newspaper press should possess the same right to criticise the conduct of the judges which they possess to criticise the conduct of any other official."

Nor was the editor of the *Central Law Journal* led astray. He observes:

> "The judiciary are but men, and therefore as open to corrupting influences as those in control of any other of the co-ordinate branches of the government, and, like them, need the deterring influence of free public criticism."

And in Wisconsin—Wisconsin upon which we so implicitly rely for our assertion of the high prerogative power, and whose judgment we so often misconstrue—does not relish the doctrine, for its judges say, *in re* Ashbaugh, *supra:*

> "Under such a rule the merits of a sitting judge may be rehearsed, but as to his demerits there must be profound silence. In our judgment no such divinity 'doth hedge about a judge,' certainly not when he is a candidate for public office."

Justice Brewer, when judge of the Supreme Court of Kansas, denounced the doctrine, for he said, *in re* Pryor, *supra:*

> "For no judge and no court, high or low, is beyond the reach of public and individual criticism."

With Wharton the doctrine does not find favor, for he affirms:

> "We can conceive not only of a weak judge who dreads intimidation, but of a corrupt judge who dreads exposure. To give a bad and bold man of this class an engine so potent as this is to do away with one of the few means by which he can be exposed."

The court made a mistake in instituting the proceeding; a mistake in holding that an affidavit is not essential to its jurisdiction; a mistake in holding that the acts of the respondent constituted contempt. But infinitely greater than these was the mistake it made in holding the truth to be immaterial. For, aside from the fact that it denied to the respondent important constitutional rights, in the very nature of things, those who before believed the charges to be true are now confirmed in their belief, and those who did not believe them now have their confidence in the court shaken solely because of the action of the court in refusing the respondent a hearing and denying him the right to offer proof in support of the charges, and in holding that it is entirely immaterial whether the matter published is true or false.

CHAPTER XI

THE RIGHT OF FREE ELECTIONS AND THE DECISION IN THE TOOL CASE

"That all elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."—Colorado Constitution, Bill of Rights, section 5.

The growth of the system of machine politics in Colorado was felt to be an evil and a danger by honest men of all parties. It had brought the Republican party, once the regular choice of the majority of the people of the state, into a position of inferiority where it was discredited as well as disapproved by a majority of the independent voters. It had fixed its control upon the local Democratic organization in the city and county of Denver, holding its power and winning its partisan victories by the most flagrant frauds. The relations between the machine politicians and the political corporations were intimate and two-fold, for, while the political activity of the corporations was largely the result of the evils of machine politics, some of the worst evils of machine politics were the direct consequence of the interference of corporations in matters that ought to have remained entirely outside the range of their activity.

These evils, developed and ever increasing through many years, reached their culmination in the contest for the governorship in the election of 1904 and in the contest case in the legislature in the early months of 1905. Those who see in the contest between Alva Adams and James H. Peabody merely a question of partisan success, a choice between the Democratic candidate and his Republican rival, have entirely failed to grasp the significance of historical events. Neither can it be said that right and justice lay exclusively on either side. Peabody came before the people with the handicap of the usurpation of military power that Justice Steele had so cogently exposed in the decision in the Moyer case. Adams' title was clouded by the undeniable frauds of the Tammany organization of Denver. Neither side could claim exemption from corporation support. One large and powerful group of financial interests was aiding the Republican with money and influence, and another, scarcely less resourceful, was forwarding the cause of the Democrat.

In the light of all the testimony and with the consensus of the most impartial observers, Adams received an undoubted majority of the fairly cast votes of the state. That many votes were fraudulently and illegally cast for him admits of no denial. That clever lawyers were able to present specious arguments to warrant the seating and retention of Peabody is a part of the record of the case. The final failure of the legislature to establish Peabody's claim, the subterfuge by which the Republican lieutenant governor became the chief executive through Peabody's resignation, the comparison of percentages of Republican loss and Democratic gain in counties where there was no suspicion of fraud or coercion, and the general trend of public sentiment before, during and after the contest, all point to the same conclusion—that Adams was the choice of a majority of the legal voters in that election.

The electoral and legislative side of that contest does not, however, concern the present volume. Robert Steele was too patriotic, too much interested in public questions and too clear-sighted as to the basic principles involved in such matters not to feel a keen interest in this important contest. But as a justice of the Supreme Court of the state he held a position too high for partisanship, and his sense of dignity and propriety was too clear to permit any participation in a public discussion of a contest that might come before him for judgment.

With an attempt that was made to bring the Supreme Court into the domain of partisan politics, and to use its authority and influence to forward the purposes of machine control of elections, he had an immediate and direct concern.

In what is known as the Tool case, the Supreme Court was asked to grant a writ of injunction against precinct judges of election, the fire and police board, the sheriff, the chief of police, the chief of the fire department, the members of the election commission, the chairman of the Democratic central committee of the city and county of Denver and the chairman of the Democratic state central committee, who were charged with conspiracy to defeat the will of the people at the polls by fraudulent registration already accomplished, and by other fraudulent practices contemplated for the period before and during the election. The Supreme Court was further asked to appoint two watchers for each designated precinct for the purpose of observing how the election in those precincts was conducted.

In their reply the respondents challenged the jurisdiction of the court in these matters, and claimed that the relief sought was in conflict with section 5, article 2 of the constitution, which provides that "All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." They further answered denying the conspiracy charged or purpose upon their part to commit any of the threatened illegal acts mentioned in the bill.

The decision of the court upon the main point, as summarized (35 Colo., page 226), was: "Individuals cannot invoke the power of a court of equity to enjoin the commission of illegal acts on the ground that they injuriously affect the public interests, but the state, in its sovereign capacity as *parens patriae*, has the right, and it is its duty, to protect its citizens when they are incompetent to act for themselves, and it may maintain an action to prevent the consummation of threatened combinations and acts which will deprive the people of their liberties, rights and privileges as citizens, although such combinations and acts would constitute crimes."

From the decision of the court Justice Steele dissented, although he filed no written opinion.

The injunction having been issued by the Supreme Court, the election was held, after which proceedings in contempt were instituted against certain persons named in the writ. At their trial it was developed that they had disobeyed the writ of the court by the perpetration of gross frauds, for which they were convicted of contempt. After these proceedings the attorney general, in the name of the people, moved for an order directing the election commission to exclude the returns from these precincts in making up the final abstract of votes. The decision of the court was that the court had the authority to make such an order in cases where frauds were committed to such an extent that the returns are absolutely false and that the truth cannot be deduced from them. The order was accordingly issued. Without filing a written opinion, Justice Steele dissented from the decision of the majority of the court.

In the counting of the votes of this election, the question arose whether the election commission, acting as a board of canvassers, may, in making up the returns, consider the tally list, or is the board limited to the certificate of the precinct election officials? In other words, in case of a discrepancy between the tally list and such certificate, which shall control? The decision of the court was that only the certificate can be considered and it cannot be changed by the canvassers by reference to the tally list. From this decision Justice Steele dissented orally, saying: "*I dissent from the judgment, because, in my opinion, it is unwarranted, without precedent, and directly contrary to the law.*"

It should be remembered in consideration of these matters that they were a part of the Peabody-Adams contest, which was itself a part of the larger struggle for the control of the state, not merely between two political parties, but also between two rival systems of politics and of government. The election for which the Supreme Court was asked to issue the injunction was that at which Peabody and Adams headed the Republican and the Democratic state tickets. The frauds alleged as a basis for the charge of conspiracy, and later established as a fact upon which contempt proceedings were based, were a part of the campaign programme of the Tammany machine. The throwing out of certain precincts by the board of canvassers under the order of the court, and the ruling of the court concerning the tally lists and the precinct certificates, gave Peabody his majority upon the face of the returns and made him defendant in possession instead of claimant in the ensuing contest in the legislature.

The majority of the Supreme Court judges apprehended the fact that they were close to the border of political and partisan activity, for they said in their original opinion:

> "The state has no interest in the success or defeat of any political organization. It is immaterial that it appears from the averments of the bill that one political organization is in control of the election machinery provided by law and will employ illegal means to the detriment of the other; nor is it material that private relators are named who are candidates of the Republican party, and that respondents are engaged in a conspiracy which will result in fraudulently depriving the Republican candidates of votes, and give to the candidates of the Democratic ticket fraudulent and fictitious votes. These are but incidents by which it is made to appear that

> the elections will be dishonestly and fraudulently conducted, so that the ballots cast by the legal voters will not be counted as they should be, or have the effect they should have, because of frauds. * * * The prevention of frauds which it is charged they intend to commit may have a political effect, in the sense that the success or defeat of a political organization may be affected, but that does not make the questions presented political instead of judicial. The action is not to have this court exercise functions which belong to any other department of government, but merely to construe the law relative to the duty of the respondents and the power of the state to execute its laws, and to command obedience to them. The questions presented by the bill are, therefore, purely judicial."

With the general proposition that the people of the state, without regard to party, have a right to all the protection that can be given by the courts for their fundamental political rights, there can be no ground for dissent. But, in view of the circumstances and precedent conditions, it is difficult to avoid the conclusion that an effort was then made, not wholly consciously by all its participants, to bend the Supreme Court of the state to the uses of machine politics, just as the effort had been made to use the executive department for a similar purpose; just as the effort was afterward made to use the legislature to overthrow the plain and manifest decision of the legal voters of the state at the polls.

In an earlier decision, in the case of People *ex rel.* L'Abbe vs. The District Court, at the April term, 1899 (26 Colorado, 386), the Supreme Court had declared that the courts of Colorado were without jurisdiction to enjoin the commission of threatened crime:

> "However desirable or convenient it might appear to put a stop to criminal practices by invoking the extraordinary writ of injunction, we cannot permit the constitutional and statutory rights of individuals to be thus violated. We cannot allow the writ of injunction to usurp and take the place of the orderly processes of the criminal law which the constitution and the legislature have provided. Such a course as the District judge adopted, if approved by us, would make of a single judge both court and jury in the trial of a criminal action whose sole object is to punish one for committing a crime; and if a defendant refused to obey his injunctive order, there could be no redress from a sentence for contempt

imposed for its violation. Such an unlimited power is too great to be conferred; at least, it has not been intrusted to any judge or court by the constitution or laws of the state. * * * As for this court, its highest obligation is to observe and enforce the constitution whose creature it is, and it is contrary to the conception of duty entertained by its members to permit precedents to be made in defiance of the constitution."

The plain proposition presented in the Tool case was that the Supreme Court of the state should in a measure assume control of the election. It was asked to issue to the election officials a mandate supplementary to that laid upon them in the statute enacted by the constitutional lawmaking authority. It was proposed to send to the polling places representatives of the supreme judicial power to act in a quasi-executive capacity toward the enforcement of the supplementary legislation prescribed by the court. It was intended to make this exercise of authority effective through the power of the court acting in arbitrary contempt proceedings under which the ordinary safeguards of criminal procedure were wholly lacking. Had there been no apparent excuse for such assumption of extraordinary authority, it could not have been approved by any intelligent citizen. There was excuse. The Democratic frauds had been bold and glaring. The rights, not merely of another political party but of the honest citizens of the state, were endangered. And one party within the state held to the theory that the constitutional provisions might properly be strained, or perhaps broken, in order to serve the apparent passing need of the moment, while another party maintained the belief that the constitution should be kept inviolate, lest in seeking a remedy for a present evil the way might be opened for the entrance of far greater dangers. If in one election the court might send its watchers to secure evidence for subsequent proceedings under its authority to punish for contempt in violations of its mandate, at another time another set of judges with greater partisan bias and with less regard for elemental justice might obstruct the free decision of the people at the polls. If the Supreme Court at one time should direct the election officials to prepare their count in a certain manner, thereby giving color of title to the governorship to one who was afterwards demonstrated to be the minority candidate, a precedent would be established that might at some future time prove a stepping stone to a grosser usurpation of power by reckless and audacious partisans.

In so far as the power of the court was sincerely and legitimately used to prevent or to punish crime and fraud, its acts were commendable. In so far as they served the purposes of partisanship and prepared the way for the subsequent effort in the legislature to maintain as governor one who received less than the number of honest votes honestly cast for his opponent, those acts were regrettable and dangerous. Some honest citizens approved them as wise and necessary, but a much larger number saw in them additional evidence of the struggle of the machine system of politics to strengthen and to maintain its hold upon the state government in opposition to the rising power of public sentiment for cleaner politics and better government.

It is to be regretted that Justice Steele did not leave upon the record in the Tool case such a comprehensive statement of his reasons and his authorities as was given to the public in the Moyer case and the Patterson case. But he left no doubt of his position in any of these matters, and it is certain that in his dissents he was influenced by no partisan prejudices, and that he saw clearly the constitutional and fundamental principles of free government that were involved in them.

CHAPTER XII

THE RIGHT OF POPULAR SELF-GOVERNMENT

"In order to assert our rights, acknowledge our duties and proclaim the principles upon which our government is founded, we declare:

"Section 1. That all political power is vested in and derived from the people; that all government, of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.

"Section 2. That the people of the state have the sole and exclusive right of governing themselves, as a free, sovereign and independent state; and to alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness, provided such change be not repugnant to the constitution of the United States."—Colorado Constitution, Bill of Rights.

THE struggle to secure a satisfactory government of cities in Colorado has been long, tedious and troublesome, and it is not yet wholly accomplished. In the year following the admission of the state to the Union, the legislature (1877) divided the cities of the state into two classes, those with more than 15,000 inhabitants constituting the first class, while those with from 2,000 to 15,000 inhabitants were of the second class. The terms of the law were general, but then, as now, Denver was in a class by itself. Thus early the legislature recognized the principle that the municipalities of the state ought not all to have exactly the same kind of government, and this fact was further recognized when the city of Denver was given a special charter by the legislature and was thus removed from the general laws governing the cities of the first and second classes.

Up to the year 1901, Colorado cities, like the cities of other American states, were governed by political machines. Primitively and primarily these machines were partisan, but as the methods of machine politics became more effective, and as the public utility corporations came to have a more intimate concern in the affairs of politics and of government, the machines became bi-partisan in the sense that the activities of the same group of men extended through the organization of both the two principal political parties, and they became non-partisan in the sense that their main purpose was not to accomplish partisan policies, but to serve the interests of the machine politicians and of special interests, corporate or individual.

In 1903, after years of political discussion and of legislative controversy, there came before the Supreme Court a case, entitled People vs. Sours, which involved the essential features of the problem of municipal government. To a greater degree than either the Moyer case, the Patterson case or the Tool case, the Sours case was one of legal technicalities, but back of the issues of legislative powers and constitutional limitations were important principles inseparably linked with the right of the people to govern themselves through the will of the majority. The decision in the Sours case was delivered by Justice Steele, who thus early in his judicial career found himself in the majority of the court, but that decision was not conclusive. It was practically reversed in the decisions in the case of People vs. Johnson and its allied cases (1904-5), from which Justice Steele dissented; and it was sustained and restored in the later decision in the case of The People *ex rel.* Attorney General vs. Cassiday *et al.* (50 Colo., 503), decided May, 1911. The case of Uzzell vs. Anderson (38 Colo., page 32) was an allied case with special reference to that part of the old Arapahoe County not included within the city and county of Denver; and the case of People vs. Horan (34 Colo., page 304) is still another portion of the complex mass of litigation.

All of these cases, with others more or less directly connected, must be considered together, for it cannot be said of any one of them that in it the constitutional questions and the principles of popular free government were focused and determined. All of them involved the amendment that added the twentieth article to the state constitution, and that amendment is the basic charter of liberty for the cities of the state. It was not primarily so intended, for in its original form it was limited to the city of Denver, but in the course of its passage through the legislature it was amended so as to include all cities of the first and second classes, under the sweeping provision: "The people of the city and county of Denver are hereby vested with, and they shall always have the exclusive power in the making, altering, revising or amending their charter," and the further provision: "The citizens of the city and county of Denver shall have the exclusive power to amend their charter, or to adopt a new charter, or to adopt any measure as herein provided." And in the section whereby this power is extended to other cities of the state, both great and small, it is specifically provided that these cities shall have "full power as to real and personal property, public utilities, works or ways."

How such a sweeping grant of local self-government and of manumission from servitude to the allied forces of machine politics and special privilege ever slipped past the watchful guardians of those interests in house and senate at that time must always remain one of the mysteries of Colorado politics. But, in view of the determined and persistent attack made upon the twentieth article, beginning almost immediately upon its adoption by the people and continuing even past the day of present writing, it seems reasonable to suppose that its importance was underestimated. It was considered to be merely a permit to the people of Denver to write another charter, similar in its essential features to that under which they had been previously plundered and misgoverned, and its broad extent and possibilities were not generally recognized, even though a full measure of credit be reserved to those who secured its enactment in its enlarged form.

The decision in the Sours case was delivered by Justice Steele, and it was supported in a special concurrent opinion by Justice William H. Gabbert, who came to the Supreme bench in 1897 as a Populist-Democrat. Extended quotations from this decision are reserved for the following chapter, but a few sentences show clearly that Justice Steele realized the importance of the twentieth article and that he was wholly in accord with its purpose to give the people of Colorado cities the right to govern themselves.

"At the outset, it should be stated," he said, "that every reasonable presumption, both of law and fact, is to be indulged in favor of the validity of an amendment to the constitution when it is attacked after its ratification by the people," and with that single sentence he swept out of existence the entire mass of technicalities which skillful lawyers had attempted to interpose between the people and the object of their will. Again, he said: "It appears to be a universal rule that, unless the court is satisfied beyond a reasonable doubt that the constitution has been violated in the submission of a constitutional amendment, the amendment must be upheld. This is not a flexible rule, to be applied to suit emergencies, but is a rule adopted to secure to the people the right they have to change the organic law whenever necessary for their safety and happiness. It means that, whenever the will of the people has been ascertained in a manner conforming substantially to the provisions of the constitution, the court shall brush aside all merely technical obstructions, without regard to the result. It is not properly applied by merely recognizing and stating it at the beginning of an opinion, and afterward rejecting every liberal doctrine of construction by which learned judges and learned courts have been able to reconcile, and permit to stand, each within its own sphere, constitutional or statutory provisions that appear to be repugnant."

As a result of the decision in the Sours case, the officers of the county of Arapahoe and of the city of Denver, according to the manner provided in the amendment, effectuated the consolidation into the city and county of Denver. A charter convention was held and the product of its labor was presented to the people of Denver, and by them rejected. A second convention was held and its charter was approved, and under its provisions a full set of city-and-county officers were elected on May 17, 1904, and assumed their offices without protest or obstruction, legal or otherwise. At the general fall election of that year the county offices would have been filled in regular order if the consolidation had not been made effective. The Republican convention met and adjourned without nominating county officers, but appointed a committee of seven prominent attorneys, which reported that the convention ought to reassemble and nominate a candidate for county judge, but they recommended that no further nominations be made; and such action was had by the convention, which then finally adjourned. At this point the record is obscured by partisan politics. The Democrats, claiming that the Republicans, through their committee on vacancies, would nominate county candidates at the latest moment, completed their ticket with the names of the then acting officials of the city-and-county of Denver. The Republicans, claiming justification in the acts of the Democratic convention, then proceeded to do what the Democrats said the Republicans would do, and nominated a full county ticket. The election which followed was that memorable contest in which the state tickets were headed by James H. Peabody and Alva Adams, and in which the Supreme Court intervened by writ of injunction and by placing watchers at the polls. The Democratic candidates had a majority upon the face of the returns; the Republicans claimed that the apparent majorities were the result of extensive frauds; the Democrats asserted that, with all fraudulent votes eliminated, they still had a lawful and honest plurality. The Supreme Court, declaring that it was impossible to distinguish and segregate the honest and legal votes, ordered the election commission to reject the entire returns in certain precincts, and thereby gave certificates of election to the Republican candidates for offices which had been declared non-existent by the decision of the Supreme Court in the Sours case. (See decision in Cassiday case, paragraph 5, page 278.) These Republican county officers thereupon brought proceedings in *quo warranto* against the city-and-county officials who were elected in May.

The principal decision of the Supreme Court was in the case of People vs. Johnson, the decision being *en banc* and delivered by Justice Maxwell, Justice Steele dissenting and Justice Gunter concurring in the dissenting opinion. Although the effect of the decision in the Johnson case was exactly contrary to the effect of that in the Sours case, the majority of the court undertook to establish the proposition that the later decision was merely carrying the principles set forth in the former case to their logical conclusion. The court having held in the Sours case that article 20 did "not exempt a portion of the state from the provisions of the constitution and laws of the state," the decision in the Johnson case declared that "the people cannot by amendment to the constitution free any portion of the state from any part of the constitution." The Sours decision upheld the provision that "the citizens of the city and county shall have exclusive power to adopt or to amend their charter or to adopt any measure as provided in the amendment." The Johnson decision declared that the charter convention under the amendment had no authority to legislate on any subject whatever in contravention of any provision of the constitution relative to governmental or state matters or to county or state offices and officers, but that its authority to legislate is limited to matters purely local and municipal in their character."

The decision in the Sours case was in effect that the people of the city and county might assign to city-and-county officers county duties prescribed by general law, and might regulate the terms of such employment. The effect of the Johnson decision was that the people of the city and county must maintain independent county officials separate and distinct from those maintained by the city.

Into the Sours decision Justice Steele incorporated that principle of construction which embodies the fullest recognition of the sovereign power of the people as the original source of official authority and as the final and ultimate arbiter of every appeal: "Wherever the will of the people has been ascertained in a manner conforming substantially to the provisions of the constitution, the court shall brush aside all merely technical obstructions, without regard to the result."

Out of the Sours decision itself the majority of the court gathered the technical material upon which to base a decision, not merely that the people had failed to do what they manifestly desired to do, but that they had no authority or way to do what they desired to do.

If at any time in the course of his high judicial career Justice Steele needed an excuse for intemperance of thought or language, that excuse might have been found ready at hand when the decision in the Johnson case not only drew from his propositions conclusions the direct opposite of his purpose, but perverted his own statements to a meaning quite different from that which was clearly conveyed by them. Yet one may look in vain through the dissenting opinion in the Johnson case for any trace of matter or of feeling unbefitting the dignity, the calm or the equipoise of that high court. The circumstances were exasperating, but he made no complaint of injustice to himself. Without yielding an inch of the position he had assumed, he pointed out the error in logic and what he believed to be the defect in law of the majority decision, and left the incident to the judgment of fair-minded men. "The writer did say," says Justice Steele, "in substance that which is attributed to him, but the conclusions drawn from what he said are to be found neither in the Sours case nor in any other case. The court says"—in the Johnson decision—"'Under the language used no one of the three things can be done by the people, and it follows that no *portion* of any of them can be done; that no portion of the state can be freed from *any portion* of the constitution.' It requires a reversal of the decision in the Sours case to reach the conclusion that no portion of the state can, by constitutional amendment, be freed from any provision of the constitution. For it was held in positive language in that case not only that the people *could* but that they *had* freed Denver from several provisions of the constitution by making article 20 a part of their constitution. * * * It is to be regretted that this court felt in duty bound to undo the work of the charter convention and to deny the people of this city and county the right to provide for a simple and economical plan of government as directed by the constitution."

In the Sours case Justice Steele had declared the "universal rule that unless the court is satisfied beyond a reasonable doubt that the constitution has been violated in the submission of a constitutional amendment, the amendment must be upheld." And he added: This rule "is not properly applied by merely recognizing and stating it at the beginning of an opinion, and afterward rejecting every liberal doctrine of construction by which learned judges and learned courts have been able to reconcile and permit to stand, each within its own sphere, constitutional or statutory provisions that appear to be repugnant." These sentences were not quoted among those by which the court undertook to support its decision in the Johnson case, and Justice Steele refrained from repeating them in his forceful argument that the Sours decision did not bear the meaning imputed to it or warrant the conclusions drawn therefrom.

The fundamental principle involved in these cases was not the clashing interests of two rival partisan candidates, it was not even the question of the consolidation of the city and county of Denver, but it was the right of the people of the cities to local self-government, drawn from and dependent upon the larger right of the people of the state to govern themselves and to alter and *abolish* their constitution and form of government whenever they may deem it necessary to their safety and happiness, provided that such change be not repugnant to the constitution of the United States. These words, quoted from the bill of rights of the Colorado constitution, admit of but one reasonable interpretation, which is that the makers of the constitution intended to make of it an instrument for forwarding and a shield for defending the will of the majority of the people, according to the basic principles of the American system of government, and not an obstacle or a fetter against the free execution of that will. Yet if the decision in the Sours case as it was interpreted in the Johnson case had become established as the supreme and fundamental law of the state, "that no portion of the state can be freed from any provision of the constitution," it would not only have blocked the road to a reform of municipal government, but it would have become one of the strongest entrenchments of minority power within the government of the state. If the judges of the Supreme Court had the right to impose their constitutional interpretations as a restriction upon the power of the people of the state to establish their will as to the conditions for the government of cities, those judges would have the same right to impose other similar limitations upon the people's right of self-government, which is so broadly and positively declared by the bill of rights.

For a half dozen years it did stand as the last word of supreme judicial authority, until the Supreme Court, reconstituted by the will of the people in a general election, nullified its former denial of the sovereign rights of the people as the constitution-making power, and restored the original doctrine of the Sours case, as stoutly maintained by Justice Steele in the Johnson case, to its primitive meaning and effect. (See page 277.) Yet even in those years the amendment bore a precious fruit of popular liberty. The Sours decision was a broad approval of the grant of power of self-government for the cities of the state. The Johnson decision denied the right of a charter convention to legislate concerning county offices or officers. Under the Sours decision other cities than Denver claimed and established their right of local self-rule, wrote their own charters, and adopted that form of government which seemed to them best adapted for their local needs and conditions. Even while the Johnson decision remained in force, Grand Junction, Colorado Springs and Pueblo installed the commission plan of city administration, and later the people of Denver amended their charter to a similar form.

The fundamental wrong of the old system was that it made city officials unaccountable to the people's will. Its greatest weakness was that it denied to them the power necessary to the proper performance of their duties. To prevent the abuse of power, power had been divided beyond the limits of efficiency; checks and balances had been multiplied until it was impossible for any official to estimate correctly the bounds of his own duty and authority, or for any citizen to know what official should be held responsible for faults or abuses in the city government. The result was that the city official, however intelligent or well-meaning, found himself utterly unable to perform his plain duty to the people. He came into office as the nominee and the candidate of a political machine, he owed his election to that same power, which effectively enforced its authority by means of the party rules and customs. His success or failure in office and his future preferment in positions of public authority and honor seemed to depend mainly upon his loyalty to the machine and not to the people, and if he set himself resolutely and honestly to the performance of his duty, he quickly found himself opposed by a combination of political and selfish forces, with which the meager power allotted to him was quite unable to cope.

The theory of the commission plan is to give a full grant of public power to public officials for the public advantage and the public defense; to localize that authority so that it may be at all times recognizable and accountable; and to make all officials at all times directly and immediately answerable to the people for an abuse of that power. The details of the commission plan in their application to the innumerable local conditions of American cities, great and small, have not been fully determined. The legal entanglements of this radical change in the system of municipal government have not been completely developed.

The principles of the commission form in making effective the will of the people in opposition to the conspiracies of machine politicians, franchise grabbers, organized law-breakers, and other criminal, anarchistic or merely mercenary forces of the cities, are a part of the principles of the American system of free government.

The decision in the Sours cases affords probably the best illustration of the clearness and quickness with which Justice Steele's mind reached to and grasped the fundamental principles of a case presented for his consideration, while his dissenting opinion in the Johnson case shows how logically his mind maintained the principle he had announced, how skillfully he avoided the pitfalls of special pleading, and how resolutely, powerfully and withal calmly he defended that which he knew to be right.

"Judge Steele was not much interested in the technicalities of the law," said one lawyer who knew him well. "He gave slight attention and little weight to the skillful arguments of those attorneys who drew their material from the maze of precedents and the fine shades of legal definitions. But when a principle of justice was at stake, or when there was involved some impairment of the rights of the people, his keenest interest was immediately aroused, and the cause of liberty never had a more earnest or a more powerful champion."

CHAPTER XIII

THE DECISIONS IN THE RUSH AMENDMENT CASES

In the case of The People *ex rel.* Elder as Treasurer of the City and County of Denver vs. Sours (31 Colo., page 369), Justice Robert W. Steele delivered the opinion of the court, which was supported by a special concurrent opinion of Justice Gabbert. Chief Justice Campbell filed a dissenting opinion.

"At the time of the filing of the pleadings in the case," said Justice Steele, "we determined that the burden was upon the respondent to establish the fact that the constitution had been violated in proposing and submitting the amendment. At the outset it should be stated that every reasonable presumption, both of law and fact, is to be indulged in favor of the validity of an amendment to the constitution when it is attacked after its ratification by the people. In the determination of these questions we ought constantly to keep in mind the declaration of the people in the bill of rights:

> "'That the people of this state have the sole and exclusive right of governing themselves, as a free, sovereign and independent state; and to alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness;'

and we should examine the objections which have been raised against the validity of this amendment from the viewpoint of a fair and liberal construction, rather than from that of one which unnecessarily embarrasses the exercise of the right of amendment. As was said by Judge Handy in 1856 in delivering the opinion of the court in Green vs. Weller (32 Miss., 684),

> "'There is nothing in the nature of the submission which should cause the free exercise of it to be obstructed or that could render it

dangerous to the stability of the government; because the measure derives all its vital force from the action of the people at the ballot box, and there never can be danger in submitting, in an established form, to a free people, the proposition whether they will change their fundamental law. The means provided for the exercise of their sovereign right of changing their constitution should receive such a construction as not to trammel the exercise of the right. Difficulties and embarrassments in its exercise are in derogation of the right of free government, which is inherent in the people and the best security against tumult and revolution is in the free and unobstructed privilege to the people of the state, to change their constitution in the mode prescribed by the instrument.'

* * * * * * *

"It is said that the constitution does not require that a proposed constitutional amendment be enrolled, and that, therefore, we should not consider the fact that an enrolled bill has been filed with the secretary of state, but should confine our investigation to the legislative journals; and, if there is a discrepancy between the two journals, that the constitutional provision that the proposal shall be entered in full upon legislative journals has not been complied with. * * * We think we should not be restricted in our investigation to the journals of the two houses, but should determine, as a matter of fact, from all the evidence which can be produced of a public nature, whether the bill as passed by the senate and by the house was the same bill. * * *

"An inspection of the manuscript journal of the house shows that the printed bill (before amendment) was inserted bodily in the house journal, and it seems clear that the failure to make the change made by the senate was a mere clerical omission on the part of the employe of the house. This amendment, as were the amendments in Kansas, was discussed for nearly a year before its submission to the people; it bore the endorsement of every political party; it received at the polls more votes than were theretofore cast for any other amendment submitted to the people. It is shown beyond a reasonable doubt that the bill as amended passed the house; and if the will of the people is to be thwarted by the design or carelessness of an employe of the legislature, then are the foundations of our government unstable and unenduring.

"The objections to the provisions of the amendment itself, and to the extent that it, either necessarily or unnecessarily, changes existing rules of law applicable to the municipal and quasi-municipal corporations embraced within the territorial limits of the city and county of Denver, are more grave and important than the one just passed upon. It is contended that the proposed amendment violates the provisions of the constitution concerning proposals of amendments by the legislature because: 1. It adds a new article to the constitution. 2. It amends more than six articles of the constitution; if not, it amends more than one article, and amendments to five other articles were submitted by the legislature at the same session. 3. It contains distinct amendments of the constitution that should have been submitted separately. 4. The amendment to the constitution that authorizes six amendments is itself unconstitutional. 5. It was submitted under a deceptive and misleading title. It is also contended that the amendment is inoperative and void, even though properly proposed and submitted, because: 1. It violates the provision of the fourteenth amendment to the constitution of the United States that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' 2. It violates the provision of section 4 of the enabling act providing that the constitution shall be republican in form * * * and not be repugnant to the constitution of the United States and to the principles of the Declaration of Independence. 3. Its operation is dependent upon contingencies.

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"Counsel say: '* * * this instrument says that the city and county of Denver can adopt *any measure*, and shall always have the exclusive power to make, alter and revise their charter. * * * That language means something. It displaces, and was intended to displace, the constitution, the laws, and the general assembly.' If this amendment must be given that construction it cannot be sustained. Even by constitutional amendment, the people cannot set apart any portion of the state in such a manner that that portion of the state shall be freed from the constitution, or delegate the making of constitutional amendments concerning it to a charter convention, or give to such charter convention the power to prescribe the jurisdiction and duties of public officers with respect to state government as distinguished from municipal, or city government. The duties of judges of the District Court, county judges, district attorneys, justices of the peace, and, generally, of county officers are mainly governmental; and, so far as they are governmental, they may not be controlled by other than state agencies without undermining the very foundation of our government. Under the constitution of the United States, the state government must be preserved throughout the entire state; and it can be so preserved only by having within every political subdivision of the state such officers as may be necessary to perform the duties assumed by the state government, under the general laws as they now exist or as they may hereafter exist.

"* * * The amendment is to be considered as a whole, in view of its expressed purpose of securing to the people of Denver absolute freedom from legislative interference in matters of local concern; and, so considered and interpreted, we find nothing in it subversive of the state government, or repugnant to the constitution of the United States.

"It is said that the amendment is void because it is dependent upon future contingencies. That the proposal, if valid, became a part of the constitution upon its ratification; whereas, the provisions relative to the creation of a charter for Denver depend upon the will of the people, which may never be exercised. In other words, that the amendment is invalid because it authorizes the people of the city and county of Denver to make a charter and that the people of Denver may never make one. This is not a contingency within the meaning of the law.

"It is stated that the proposal was submitted under a misleading and deceptive title. There is no proof that any elector was deceived by the title under which the amendment was submitted, and the proposed amendments were published in full in a newspaper in each county of the state for four weeks preceding the election. In this connection it is urged that the people who voted for this amendment constituted only a minority of the electors of the state, and that only about one-third of the electors expressed themselves upon the subject of the amendment. This is not very important, for we should be compelled to sustain this amendment though but a bare majority of the electors had favored it if, in our opinion, it was legally submitted and ratified, and we should declare it invalid if its invalidity were established beyond a reasonable doubt, although it had received the unanimous support of the electors. It is hard to account for the apparent indifference of the people on the occasion of the submission to them of changes in their organic law. The indifference which prevails in Colorado prevails in other states, and it rarely occurs that a proposed amendment to the constitution receives the attention of more than one-half of those who vote for candidates for office. In the absence of a constitutional provision to the contrary, the people who do not express themselves upon the subject submitted to them are regarded as having assented to a determination by those who do express themselves.

"The amendment which authorizes six amendments is attacked because, as it is said, it was not the intention of the framers of our constitution to permit revision and alteration of the constitution except by constitutional convention. The original constitution does not say that the article entitled 'Amendments' cannot be amended, but says the legislature shall not propose amendments to more than one article at one session.

* * * * * * *

"In the main we regard the questions presented as judicial, although in the briefs and arguments upon the relevancy of certain provisions of the amendment to its main object or purpose, questions of policy and expediency have been discussed which are legislative rather than judicial; but we are clearly of opinion that the legislature cannot propose an amendment to the constitution not in substantial compliance with its provisions.

"It appears to be a universal rule that, unless the court is satisfied beyond a reasonable doubt that the constitution has been violated in the submission of a constitutional amendment, the amendment must be upheld. This is not a flexible rule, to be applied to suit emergencies, but it is a rule adopted to secure to the people the right they have to change the organic law whenever necessary for their safety and happiness. It means that, whenever the will of the people has been ascertained in a manner conforming substantially to the provisions of the constitution, the court shall brush aside all merely technical obstructions without regard to the result. It is not properly applied by merely recognizing and stating it at the beginning of an opinion and afterward rejecting every liberal doctrine of construction by which learned judges and learned courts have been able to reconcile and permit to stand, each within its own sphere, constitutional or statutory provisions that appear to be repugnant.

"We are not only not satisfied beyond a reasonable doubt that the constitution has been violated, but are of the opinion that the amendment proposed can be sustained upon purely legal principles, supported by adjudicated cases.

* * * * * * *

"We therefore conclude that the disagreement between the journals is a mere clerical mistake, that the same bill in fact passed both houses, and that the entering by mistake upon the journal of the house of the half dozen words quoted does not violate the provision of the constitution requiring the proposal to be entered in full upon the journals of both houses. That, under the constitution, the legislature may propose an amendment as an original article or as an amendment to an existing article. That the limitation that the legislature may not propose amendments to more than six articles of the constitution at the same session does not apply to constructive amendments, or amendments by implication. That an amendment may embrace more than one subject. That if an amendment embraces more than one subject, such subjects need not be separately submitted if they are germane to the general subject of the amendment, or if they are so connected with or dependent upon the general subject that it might not be desirable that one be adopted and not the other.

"That this amendment does relate to a single, definite object or purpose, and that the several matters objected to as not germane thereto do appear to be so connected with or dependent upon that object or purpose that they ought not to have been separately submitted.

"We have examined all the questions presented, and have disposed of those we regard as essential to a determination of the case.

"We do not hold that, in proposing amendments to the constitution, the document itself can be ignored, or that, because the people have ratified it, an amendment proposed in violation of the constitution nevertheless becomes a part of that instrument; but hold that in the proposal and submission of this amendment the constitution has not been violated.

"We are not unmindful of the fact that authorities have been cited which support views contrary to many of those herein stated, but when a constitutional provision is fairly susceptible of two interpretations—one which will overthrow the will of the majority as ascertained at a general election, will cast discredit upon amendments that have been long acted upon as part of the constitution, and will convict legislature after legislature of a disregard for the provisions of the constitution; and one which will produce the contrary result—our duty is plain.

"Let judgment be entered in favor of the petitioner, in accordance with the prayer of the petition."

THE DISSENTING OPINION IN THE JOHNSON CASE

In the case of The People *ex rel.* The Attorney General vs. Johnson (34 Colo., page 143), Justice Maxwell delivered the opinion of the court *en banc.* Justice Steele filed a dissenting opinion, in which Justice Gunter concurred.

Justice Steele said:

"Whether article 20 of the constitution of Colorado does or does not confer upon the people of the city and county of Denver the power to provide by charter for an additional county judge within the city and county is a fairly debatable question, and depends upon an interpretation of the article itself with a view to determining its true intent and purpose. This the court has not attempted; but it has found in the general propositions announced in the Sours case to the effect that there must be, within every political subdivision of the state, some agency for performing the governmental duties of the state in accordance with the general laws of the state, satisfactory authority for declaring it to be '*stare decisis*,' not only that there cannot be two county judges within the city and county of Denver, but that the plan of joint city and county government, by a single set of officers, as provided for by the article, must be overthrown and held for naught, and a double set of officers—city officers and county officers—installed and maintained in a single body politic and corporate known as the city and county of Denver. I shall, therefore, shorten the discussion by simply contending that there is nothing either in the Sours case, or in any other case, for that matter, to justify the conclusion of the court that the people of the city and county of Denver had no authority to legislate in any particular with respect to the offices of sheriff, treasurer, assessor, clerk and recorder, justice of the peace or constable, or dispense with county commissioners. I believe that they have just such authority as was conferred upon them by article 20—conferred expressly or by necessary implication—and none other.

"In the Sours case it was said, *arguendo*, that it would be subversive of state government to give to the people of the city and county of Denver the power to adopt any *measure*, in the broad sense contended for by counsel, and therefore the words in section 5, 'or to adopt any measure as herein provided,' were construed, as limited by the context, not to authorize the charter convention to propose measures changing governmental acts and duties; and it was held that such duties were intended to remain under the control of the legislature and of the general laws. There is nothing in the Sours case holding or intimating that these governmental duties could not be performed by a single set of officers for the city and county, or that such officers could not be elected at a single election; and no such construction was even contended for by counsel opposing the amendment. The Sours case was regarded by everybody, until a controversy arose as to the power of the people by charter to increase the number of county judges, as settling a proposition that article 20 was legally adopted by the people as a part of the constitution, and that it was feasible and legal throughout when given the construction that in prescribing the 'jurisdiction, term of office, duties and qualifications of all such officers,' it did not mean that the charter convention could so prescribe in cases where it would operate to hinder the performance of the acts and duties required of county officers to be done by the constitution or by the general law, as far as applicable to the changed conditions of the new municipality.

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"The charter convention following the decision in the Sours case made no attempt to dispense with any constitutional or statutory requirement as to the jurisdiction, duties or qualifications of officers performing governmental duties; and so the question before the court really was whether that convention was authorized to make a mere change in the term of office and time of election of an officer performing governmental duties. And it does not follow by any rule of logic or of judicial construction that the exercise of a power expressly given that does not or cannot if reasonably or sensibly exercised interfere in the slightest degree with the governmental duties required to be performed within this consolidated city and county implies the right to legislate upon any other matter whatever. The right to legislate is to be found in article 20, or does not exist; and it is *res adjudicata* by the Sours case that article 20 is a part of the constitution of Colorado and therefore is itself constitutional.

"The main contention in the Sours case was, not that the municipality created by article 20 was unrepublican, but that the article embraced several subjects and amended more articles of the constitution than was permitted by that instrument. It was conceded by all that many of the articles of the constitution were modified, limited or abrogated so far as the territory set apart as a new city and county was concerned by article 20.

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"And so I say that this court ought to have held that the provisions of article 20 empowering the people of the city and county to have for their new municipality a single set of officers, to be elected or appointed at such times as the charter might provide, was a valid provision not perversive of state government or unrepublican in form, and that the suggestion that the people might select officers for life was too remote and too speculative to be entitled to serious consideration.

"In the Sours case it was said: 'Under the constitution of the United States the state government must be preserved throughout the entire state; and it can be so preserved only by having within every political subdivision of the state such officers as may be necessary to perform the duties assumed by the state government under general laws as they now exist or as they may hereafter exist.' And it was held that it was not contemplated by the article to relinquish state government within the city and county of Denver because the article expressly provided that the charter adopted should designate the officers who should perform the acts and duties of county officers. Because the article provided that the citizens of the city and county of Denver should have exclusive power to adopt a new charter or to adopt any measure it was contended that the constitution and laws and the general assembly were displaced within the city and county, and to answer this statement it was said, in addition to what I have quoted, 'The amendment is to be considered as a whole in view of its express purpose of securing to the people of Denver absolute freedom from legislative interference in matters of local concern.' The writer of the opinion was not undertaking by hostile construction to nullify the article 20 nor to argue away the plain provisions of the article which do not admit of interpretation or construction because they interpret themselves, but he was undertaking to give the effect intended by the people. The provisions of the article that the officers of the city and county of Denver shall be such as by appointment or election may be provided for by charter can have but one construction. But the language of section 5 of the article providing that the citizens of Denver shall have the exclusive power to amend their charter or to adopt a new charter or to adopt any measure as therein provided was claimed to extend to every subject and was authority for the people of Denver to enact any law embracing any subject. And it was held that the authority of the people to legislate through charter and otherwise extended only to matters of local concern; that is, to matters affecting the new municipality. That did not mean that the city and county should not provide for its officers as expressly directed by article 20; it did mean that the people of Denver were not given power nor was it intended to grant them power to legislate upon general subjects such as crimes, negotiable instruments, civil procedure or any other subject not applicable to local government except as directed and empowered by article 20.

"The court says that it is held in the Sours case that the people cannot:

"'1. Free any portion of the state from the operation of the constitution.

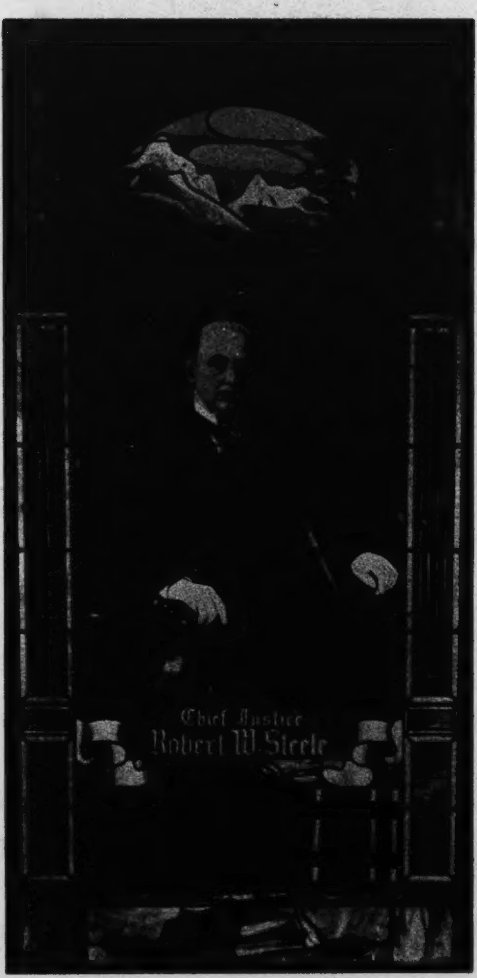
"'2. Delegate to a charter convention the making of constitutional amendments.

"'3. Give to a charter convention the power to prescribe the jurisdiction and duties of public officers with respect to state government as distinguished from the municipal or city government.'

"Although the language used is not that employed by the writer of the opinion in the Sours case it is sufficiently accurate for the purposes of this discussion. The writer did say in substance that which is attributed to him, but the conclusions drawn from what he said are to be found neither in the Sours case nor in any other case. The court says: 'Under the language used no one of the three things can be done by the people, and it follows that no portion of any of them can be done; that no portion of the state can be freed from any portion of the constitution.'

"It requires a reversal of the opinion in the Sours case to reach the conclusion that no portion of the state can, by constitutional amendment, be freed from any provision of the constitution. For it was held in positive language in that case not only that the people could, but that they had freed Denver from several provisions of the constitution by making article 20 a part of their constitution. But, because it is stated in the opinion in the Sours case that it was the express purpose of article 20 to secure to Denver freedom from legislative interference in matters of local concern, it is asserted that, 'If the majority of the court in the Sours case had been of the opinion that article 20 had for its purpose the securing to the people of Denver absolute freedom from legislative interference in all matters relating to county and state governmental offices, officers and functions, the inevitable conclusion would have followed that the amendment would have been held subversive of a republican form of government and repugnant to the constitution of the United States.' The court then proceeds to show that the provisions of the charter are in conflict with article 6 of the constitution. It was held in positive terms in the Sours case that article 20 did amend, limit, repeal or abrogate very many of the articles of the constitution, but that such changes were incidental merely and did not render article 20 invalid; that article 20 created a new sort of municipality having the combined powers of city and county governments; that the powers of city and county municipalities being essentially different, in investing this new municipality with the powers of both, it became necessary to modify the provisions of the constitution relative to municipal affairs by providing new ones applicable to such combined government. 'But,' it was said, 'this is not an amendment of those provisions such as in our judgment was in contemplation by the framers of the constitution, because the constitutional provisions that are abrogated as to the city and county of Denver remain in force generally throughout the state.' And when the court holds that the charter provision relative to county judges is invalid because it violates article 6 of the constitution and holds that other provisions of the constitution are violated when the charter provided for the terms and qualifications of other county officers, it ignores the provisions of article 20, overlooks the fundamental rule in the construction of constitutions and statutes that a special provision controls the general one and that both may stand; misconstrues the decision in the Sours case which holds that article 20 amended and modified very many of the articles of the constitution by making special provisions for the government of Denver; and bases its decision upon the doctrine the direct opposite of that maintained in the Sours case. For when the people of the state granted to Denver by article 20 power to select public officers, fix their salaries, designate a time for their election, although they relinquished a power theretofore retained by them or delegated to the legislature, they but granted to Denver power to legislate in matters of local concern; and when the people required that the charter of the city and county should designate the officers who should respectively perform the acts and duties required of county officers to be done by the constitution or by general law as far as applicable, they declared that they did not relinquish the right to require the performance of government duties within the territory of the city and county and they did not free Denver from the constitution, because article 20 is a part of the constitution, and every article of the constitution is applicable to Denver unless article 20 otherwise provides.

"The people of the state created of the territory a municipality with county and city powers. The boundaries of the city and county were co-terminous, the territory densely populated. Property within the territory was owned by county and city and town governments and was by article 20 declared to be the property of the city and county. Within the territory were several school districts. By the article they were consolidated. No reason is apparent why there should be two treasurers to handle funds raised by taxation or why there should be two bodies having control of the streets and alleys and bridges of the city and county with power to keep them in repair; or why there should be two boards in control of city and county property, or why there should be two attorneys, one to represent the city and one the county; or why there should be two boards within the territory to levy taxes, one to make a levy for city purposes and one for county purposes. The people in their


Chief Justice
Robert W. Steele

MEMORIAL WINDOW, SUPREME COURT ROOM, CAPITOL BUILDING

sovereign capacity said there should be one set of officers, and this economical scheme of government should have been upheld and not overthrown.

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"To one who has lived there practically all his life the assumption that the people of Denver would use the power granted them by the constitution as a mere plaything is preposterous. The question is, did the people of the state grant power to the people of Denver to name their officers for such terms and at such times as by a charter adopted by the people should be determined? This is not answered by the assertion that if the people have such power they might misuse it. I know of no power that we have to declare a constitutional power invalid because we deem it unwise. But if the charter had provided for ten county judges and had provided that they should hold their terms for life, with the power of naming their successors—if the constitution of the state authorized it—it should be upheld because there is nothing in the federal constitution or in the enabling act prohibiting such a provision; and the charter with such a provision in it is not unrepublican, because the people of Denver have retained the power of changing the provisions of the charter, and the people of the state have retained the power of changing or annulling the article.

"Finally, the charter ratified by the people was framed by a body of eminent citizens chosen from the various callings they represented because of their known ability, long residence in the state, and familiarity with the needs of Denver and the desires of her people. Several of the lawyers in that body had appeared before this court in the Sours case opposing the validity of article 20. The construction given to the decision in that case by these gentlemen and other members of the convention is shown by the reference to the charter provisions. That they were not undertaking to free Denver from the constitution or attempting to evade the performance of governmental duties within the city and county of Denver or undertaking to make a farce of the proceeding for the framing of the charter is evidenced by section 156, which is as follows:

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"Wherever the question has been presented the courts have given effect to the wishes of the people and sustained the power to establish the form of government here provided as not being in violation of the federal constitution and not in excess of the powers of the people to so provide in their organic law. And it is to be regretted that this court felt in duty bound to undo the work of the charter convention and to deny the people of this city and county the right to provide for a simple and economical plan of government as directed by the constitution."

CHAPTER XIV

SOME DECISIONS IN MINOR CASES

HAVING been elected by the people in the general election of November, 1900, Justice Steele entered upon the duties of the Supreme Court on January 8, 1901, as successor to Judge L. M. Goddard. Justice Goddard was a Democrat and was in regular line for renomination and re-election. The Supreme Court, however, had given a decision a short time previously in the Morgan case, declaring the unconstitutionality of a law passed by the Twelfth general assembly establishing an eight-hour day for underground mines, smelters and reduction works. This decision was extremely unpopular in many parts of the state, and this is given as one reason why the Democratic convention of 1900, in arranging a fusion ticket, assigned the Supreme Court nomination to the Silver Republicans, thereby avoiding the dangerous dilemma of endorsing or disapproving Judge Goddard's tacit approval of the Morgan decision. Judge Goddard, it may be noted further, was one of the two justices of the Supreme Court nominated by Governor Peabody on January 7, 1905.

During the first term of court in Justice Steele's service, his name was attached to four decisions which may serve at least to illustrate the varied nature of the causes with which he was called to deal. The first was a decision in a proceeding for disbarment against an attorney, in which the judge enforced the principle that in such cases it is not sufficient for the accused to declare his innocence of the charge made against him, but that he must also explain and set forth the good faith of the transactions to which the charges relate; however, when the explanation is insufficient, without being purposely evasive, the attorney will be given an opportunity to vindicate himself. The decision is the first recorded for the January term, 1901 (28 Colo., page 223). The second was a mining case in which the lower judgment was reversed for error. The third case was a complicated matter of water rights, pleadings and technicalities, in which the judgment of the lower court was affirmed. The fourth was a decision in a divorce case involving some rather trenchant matters of morals as well as of law, in the course of which the new justice took occasion to say: "A married man who, for ten years of his life, has indulged in the habit of drinking and coming home at bedtime in a condition incident to the degree of inebriety varying from the garrulous exhilaration of one only partially intoxicated to the sullenness of a sot, cannot expect his wife to show that affectionate regard for him which is his due under other circumstances, and cannot complain if she does not engage in conversation which she knows will terminate in a quarrel," a statement full of practical common sense and reminiscent of the County Court.

In the next term (April, 1901) Justice Steele delivered four opinions, three sustaining and one reversing judgments of the lower courts. In the September term of the same year the work was much heavier, his name being affixed to fifteen cases, two at least of which were of more than ordinary importance. In eight of these cases the judgments of the lower courts were reversed, in two the inferior judgments were sustained; in two cases appeals were dismissed; one case was remanded to the Court of Appeals; in one case a perpetual writ of prohibition was issued and the lower court was directed to dismiss the case; in one case Justice Steele recorded a dissent.

One of these cases was that of the City of Leadville vs. Coronado Mining Co. (29 Colo., page 23). This case, with that next following, Leadville vs. St. Louis Smelting & Refining Co., involved the right of property in ore taken from beneath the streets and alleys of the city. The decision of the District Court in both cases had been against the city on account of the lack of certain documentary evidence, and the Supreme Court reversed this decision on account of error of the lower court in refusing to admit other evidence in proof of the missing plat. The reversal, therefore, was determined upon a legal point, but in his decision Justice Steele declared the principle that in such cases, while the fee of the city is qualified, base, or determinable, by vacation, abandonment or disuse, the absolute control and dominion over the streets is not impaired, nor did the donor convey less than his entire estate by the dedication and conveyance of the streets and alleys; and the interest which the abutting lot owners have is a mere possibility that at some future time the streets will be abandoned, in which event the fee will pass to them by operation of law. The case attracted much attention throughout the state, especially in the mining counties, and the decision was generally approved as being a defense of the rights of the people. In the concurring opinions of Justices Campbell and Gabbert, they said: "We do not consider it necessary or appropriate at this time to express our views as to the legal propositions discussed by our associate further than they are indicated in the reason given for concurring in the judgment of reversal." In later decisions, however (37 Colo., page 235), Justice Goddard, in delivering the opinion of the court, disregarded Justice Steele's earlier statement as *obiter dictum*, and declared that the common law dedication in such cases was merely for the use of the public, as an easement, and did not involve conveyance of the fee. To the later opinions no dissent was recorded.

In the case of Rocky Mt. Oil Co. vs. Central National Bank, upon the petition for a rehearing, are recorded for the first time the afterward familiar words, "Mr. Justice Steele dissents." No explanation of this variance is recorded, but the majority opinion seems to turn upon the statement: "It is obvious that to carry out the intent of the legislature and at the same time harmonize the attachment act with the law governing the creation of domestic corporations, the word 'and' must be substituted for 'or,' and the subdivision given the construction stated in the main opinion."

The case which bears the headline The People vs. District Court (29 Colo., page 182) is a complicated matter involving the District Court of Pueblo County, the state board of assessors, and certain taxpaying railroad, telegraph and telephone companies, also the validity of a revenue law passed in 1901. The original opinion was delivered by Justice Steele, and its closing sentences afford a good illustration of the fine courtesy which he extended toward those with whom he had official dealings: "We are forced, therefore, to the conclusion that the judge of the District Court had not jurisdiction of the subject-matter, namely, the issuance of an injunction to prohibit the state board of assessors from performing their duties, and that in granting the temporary writ of injunction he exercised an unwarranted interference with a board which is a part of the executive branch of the government of this state; and such act, being beyond his jurisdiction, is null and void." The respondent in the case was Hon. N. Walter Dixon, concerning whom Justice Steele continues his decision: "The respondent says he has no interest, direct or indirect, proximate or remote, in the litigation, nor has he any desire of preference as to the outcome other than that justice be done according to law; and that in all his acts he has been impelled solely by a desire to observe his oath of office and perform his duties. This we should have known and believed without his verification; and, while our views are radically different in this case, we trust we shall have always, as we have now, great respect for the District Court of Pueblo and for the judges thereof." Justice Gabbert filed a concurrent opinion in the main proceeding.

In spite of the injunction issued by the District Court, the state board of assessors went ahead with its work, and upon original proceedings in contempt was summoned before the Supreme Court. Justice Steele delivered an opinion that, under the circumstances, the Supreme Court had no power to deal with the acts of the state board. Justice Gabbert decided that certain members of the board were guilty of contempt and their acts void. In the absence of Chief Justice Campbell the case was thus suspended. Upon petition for rehearing on the question of jurisdiction, Justice Gabbert delivered a lengthy opinion sustaining his views as previously expressed, and Justice Campbell, upon his return, concurred in Justice Gabbert's opinion, holding the board members and attorney general guilty of contempt, but imposing no penalty of fine or imprisonment. Thereupon, Justice Steele filed a dissenting opinion, concluding as follows: "Those cases are not authority for this judgment, for the reason that those cases give the party something that he was legally entitled to, while this judgment gives the companies something they were not legally entitled to, namely, freedom from assessment after the time the statute required assessment to be made. The railroads having no right to prevent the assessment, no advantage was taken of them by the making of it; and they were entitled to no relief, legal or equitable. No authority was cited by counsel supporting their right to this judgment, no principle was announced which, in my opinion, was applicable to this case; and yet the court has rendered a judgment which brings confusion to the affairs of state, basing it, as it seems to me, upon no applicable principle, nor the authority of any adjudicated case. I do not insist that appellate courts should be controlled by the judgments and opinions of other courts, nor that they should surrender their own well considered opinions to the opinions of other persons; but I do insist that where the effect of the judgment is to cause the community to suffer great loss, and where it disturbs and disorders governmental affairs, the court should not render such judgment except it be based upon the authority of some adjudicated case or founded upon some well recognized rule or principle of law."

Thus, within the first year of his presence in the Supreme Court, Justice Steele came to a sharp variance with his eminent colleagues, a variance that was the manifestation of a fundamental difference of legal temperament, of intellectual process, and of theory of government; a variance that was not diminished or reconciled by the passage of years, and that culminated in the decisions and the dissenting opinions in the Moyer, the Patterson, the Tool, the Sours and the Johnson cases.

The decision in the Ryan case (29 Colo., p. 410), to which Justice Steele filed a dissenting opinion, turned upon the omission of the word "not" in the instructions of the judge of the lower court. Justice Steele said: "I cannot consent to the judgment of reversal. A verdict in the sum of $3,000 only was rendered against the defendant. The testimony shows that the plaintiff's only means of support was the labor of her son, who was killed, as the evidence tended to show, through the gross negligence of the defendant, and I am unwilling to consent to a reversal upon what seems to me the merest technicality and inadvertence. * * * We think it is the duty of the appellate courts not to reverse a judgment upon a mere technical error when it is apparent from the entire record that the error was merely inadvertent and one which the court would have corrected instantly if its attention had been called to it by counsel. It is the duty of counsel not to permit the court to make an error of this kind."

In the case of Union Gold Mining Co. vs. Crawford (29 Colo., page 526), Justice Steele delivered the opinion of the court, affirming judgment for $15,000 against the mining company for the disabling injury of its employe, and declaring: "Guided by these authorities, we can arrive at no other conclusion than that the proximate and efficient cause of the injury was the negligence of the defendant, and that it should be held liable to the plaintiff for the damages shown to have been sustained. It is urged that the verdict is excessive. Counsel say that fifteen thousand dollars loaned at eight per cent interest will yield the plaintiff an income in excess of the amount he has ever earned or is able to earn, without touching the principal. This without the slightest physical or mental exertion. This company, by its culpable and wanton negligence, has made a physical wreck of its employee, and it would now enforce this cruel rule against him by showing that the amount of the verdict at interest will yield him more than he could earn if he were in perfect physical condition. But if his damages were measured by this unjust rule, the verdict is not excessive. In the first place, he cannot, 'without making the slightest mental or physical exertion,' cause his capital to yield eight per cent interest. After the payment of expenses and taxes, he will do well if he receives four per cent on his money, but little more than half of the amount he could earn before the injury. So that, eliminating entirely the question of damages for the loss of his leg, the damages for the fracture of his skull, the amount of the verdict, if placed at interest, will return to him barely sufficient to live upon."

In the following case, City of Denver vs. Hubbard, Justice Steele, declaring the decision of the court, reversed the judgment against the city in a damage suit because the judge had not instructed the jury that the plaintiff was required to exercise increased care while walking upon a defective sidewalk covered with ice and snow, when she had lived for months in the building in front of which this sidewalk was and she was familiar with its condition.

In the September term, 1902, Justice Steele delivered the decision of the court in the important Clayton will case, involving the foundation of the George W. Clayton College, a home and school for orphan boys, in the city of Denver. The decision established broad grounds for the maintenance of public charities by individual bequests in Colorado, and sustained the manifest purpose of the testator, saying: "Here, then, is a public charity. Through it Mr. Clayton seeks to bring the minds and hearts of poor orphans under the refining influence of education. After making such provision as he thought proper for the natural objects of his bounty, he has selected, as deserving of his benevolence, the poor white orphan boys of Denver and Colorado, and has devoted the residue of his great fortune to the erection and support of a permanent college for their free instruction and maintenance, that they may become useful citizens and honorable members of society. It is an indulgent, edifying and worthy charity. It will lessen Denver's burdens of government. To thousands of poor orphan boys it will be a blessing forever, and it will be by them forever blest."

In this term Justice Steele's name is recorded in connection with sixteen cases. In eight the judgments of lower courts were affirmed; in four the lower judgments were reversed; one was remanded; one was dismissed on error; and in two Justice Steele filed dissenting opinions. One of these concerned a small matter of an estray; the other was the case in which the legislature, in reapportioning the senatorial districts of the state, assigned sixteen senators for re-election in a year when there were only fifteen vacancies. The majority decision (Mills vs. Newell, 30 Colo., page 377) was that neither the secretary of state nor the Supreme Court had authority to interfere in the matter, but that the question could be determined only by the senate itself. From this decision Justice Steele dissented in vigorous language, saying: "I disagree with my associates in the disposal of this case. * * * I deem it to be the duty of the secretary of state, when the legislature has indicated that no election shall be held in certain senatorial districts for a certain year, to refuse to receive certificates of nomination from such districts, and the duty of this court to uphold that official in thus executing the will of the legislature."

The case of Town of Manitou vs. International Trust Co., with its correlated case of Manitou vs. Townsend *et al.*, as reported in 30 Colorado, page 467, involved the principal issue whether certain tracts of land, including some of the Manitou mineral springs, had been dedicated to public use as a park. Justice Steele delivered the opinion in which the judgment of the lower court was affirmed in favor of the Manitou Mineral Water Company and against the town. In discussing the alleged common-law dedication for park purposes, Justice Steele said: "The plat of 1874 does not purport to convey this property as a park. It is claimed, however, that the property in controversy appears on the plat like an oblong green leaf in the very center of the town, and is completely segregated from other tracts of ground by highways; that no number or designation of any kind appears on the tract of ground; that these facts show an intention to dedicate as well as a dedication, and authorities are cited which hold that, when places appear upon the plat of a city or town without designation, such places are to be regarded as for the use of the public. We cannot agree with counsel that the plat itself is evidence of an intention to dedicate. True, the shape of the lot is somewhat as counsel allege, but there are other portions of the town shown to be of irregular shape. Upon the map of 1874 this portion is colored green; so are very many other portions of the plat. The lots are of various shapes and dimensions, the blocks are not of uniform dimension or shape, and from the plat itself, there being no express designation of this place as a park, it cannot be determined that it was intended as a park." It might require a personal inspection of the scenic townsite of Manitou to appreciate the full force of the argument, but its humor, delicate and delicious as the fragrance of a mountain flower, cannot fail to impress even the casual reader and to give a pleasure the more intense because of its surprising presence in a volume of Supreme Court decisions, from which it detracts nothing of dignity or force.

In this case, too, there is an example of another of the qualities that endeared Justice Steele to his associates upon the bench, to the attorneys of the court and to the people. Petition having been made for a rehearing, Justice Steele denied the petition, saying: "In the opinion it was held that municipal authorities cannot base their right to public places upon the act of a proprietor of land in selling lots by reference to a plat upon which such public places are designated; and that, until there has been an acceptance, the act of the proprietor in selling lots amounts to a mere offer to dedicate and can be withdrawn. In the petition for rehearing, it is stated that this holding is contrary to the doctrine announced. * * * The position of counsel is, in the main, correct, and we withdraw the statement." Justice Steele had that quality of mind and character which makes it a part of honesty to admit mistakes, and he did so as frankly and as fearlessly as he maintained his opinions when he believed them to be right.

On January 12, 1904, Chief Justice Campbell's term of office expired, he succeeded himself as justice of the court by re-election, and Justice Gabbert became chief justice by seniority.

Reference has already been made (chapter four) to Justice Steele's interest in the laws protecting animals from inhumane treatment, and further interest in this subject is shown in the case of Bland vs. The People (32 Colo., page 319), in which the principal point at issue was the constitutionality of a law recently passed by the legislature which prohibited the docking of horses' tails. In rendering the decision, Justice Steele said: "The docking of a horse's tail is cruelty, not only because of the torture inflicted by the operation, but because, by depriving the horse of the use of his tail, he is deprived of the use of a weapon supplied him by nature for his protection from the myriad of winged pests that infest the land. * * * The foregoing authorities establish: 1. That it is within the police power of the state to prohibit cruelty to animals, because such prohibition is a protection to the animals and tends to conserve the public morals. 2. That in the exercise of the power the legislature may adopt such reasonable means as is necessary to accomplish the purposes of the statute. 3. That to the legislature is confided a large discretion in declaring the public policy, and that, unless the legislation is clearly and palpably in violation of the fundamental law, it will be sustained. 4. That all property is held under the implied obligation that the owner's use of it shall not be injurious to the public. * * * We regard the law as just, wise and humane, and withal a lawful exercise of the power confided to the legislature, because it conserves the public morals and because it punishes the cruel and sense-less treatment by man of his best and most constant friend."

By an amendment to the constitution adopted at the general election, November 8, 1904, the number of judges of the Supreme Court was increased to seven, and the Court of Appeals was abolished, to take effect on the first Wednesday of April, 1905. Judges Julius C. Gunter and John H. Maxwell of the Court of Appeals became, by the amendment, justices of the Supreme Court, and Judges Luther M. Goddard and George W. Bailey were appointed by Governor Peabody to be justices of the Supreme Court.

In the September term, 1905, an important case came before the court, involving the general powers of city governments under article 20 of the constitution, and more particularly the power of the city and county of Denver, to erect an auditorium, to purchase a site therefor and to issue bonds to provide funds for such a building and site. The case is recorded as Denver vs. Hallet (34 Colo., page 393). Justice Steele delivered the opinion of the court, saying, in part: "The judgment of the District Court was right. The power to direct the issuance of bonds for the erection of an auditorium was granted by the people when they voted affirmatively upon the question submitted; but the people granted the power to issue bonds 'bearing interest at the rate of four per cent per annum, maturing in not less than fifteen nor more than thirty years, the principal to be payable in equal annual instalments commencing the next year following the issuance of said bonds,' not bonds 'payable at the option of the city and county fifteen years after date.' * * * In holding, as we do, that the bonds proposed are not the bonds directed by the people to be issued, we have determined the case, and might well refuse to decide the other questions involved. But inasmuch as the power of the city to erect a public auditorium is challenged and the question is of public moment and concern, and as much time and expense will be saved by a determination of this, the main question, we are constrained by the force of the public interests to give our opinion upon this subject. * * * We agree with counsel that no power to build an auditorium is expressly granted by the twentieth article; that such power is not incident to the powers expressly conferred, nor can it be necessarily or fairly implied therefrom; and that an auditorium is not indispensable to the objects and purposes of the municipality as declared in the twentieth article. But we do not agree with him that the stinted grant of power contained in section 1 and other parts of the article is the only power possessed by Denver. It seems very clear that the statement contained in the first section was not intended to be an enumeration of powers conferred, but simply the expression of a few of the more prominent powers which municipal corporations are frequently granted. The purpose of the twentieth article was to grant home rule to Denver and the other municipalities of the state, and it was intended to enlarge the powers beyond those usually granted by the legislature; and so it was declared in the article that, until the adoption of a new charter by the people, the charter as it then existed should be the charter of the municipality, and, further, that the people of Denver shall always have the exclusive power of making, altering, revising or amending their charter; and, further, that the charter, when adopted by the people, should be the organic law of the municipality and should supersede all other charters. It was intended to confer not only the powers specially mentioned, but to bestow upon the people of Denver every power possessed by the legislature in the making of a charter for Denver. * * * The general purpose of all municipal corporations is to promote the general welfare and happiness of the people; and provisions are generally made for the suppression of vice and immorality, and the advancement of public health and good order, and the promotion of trade and industry. For many years Denver has had power under her charter to appropriate funds for the entertainment of visitors and for the expenses of funerals, power to take an enumeration of the inhabitants, to foster and encourage manufactories, for laying out and ornamenting grounds for a cemetery and for the sale of lots therein, and to support or own a public library. Not one of these powers can be regarded as indispensable to a municipality. Municipalities are permitted to exercise them because they tend to the advancement, the culture, the convenience and the general welfare of the public. It is not a valid objection to the exercise of such powers that one class of the inhabitants would receive more benefit than another. The test is whether the power, if exercised, will promote the general objects and purposes of the municipality, and of this the legislature is the judge in the first instance; and, unless it clearly appears that some constitutional provision has been infringed, the law must be upheld." Chief Justice Gabbert, Justice Campbell and Justice Maxwell dissented from that part of the opinion which held that the city and county of Denver have the power to direct the erection of a public auditorium at public expense, it being their opinion that the purpose mentioned was not a "corporate purpose."

Justice Steele always maintained a lively and, so far as was consistent with his position, an active interest in the welfare and the development of Denver. No decision of his career gave him more pleasure than that in the Auditorium case, and he very properly felt that in maintaining the doctrine of a full grant of power in article 20 he had not only confirmed the right of the city to its magnificent convention hall, but he had also opened the way for other benefits of a similar nature to all the cities of the state. When the corner stone of the great building was prepared, Justice Steele was asked to select a suitable inscription, and he chose for this purpose the following words: "Let all the nations be gathered together—let the people be assembled," which remain as the declaration of its primary purpose.

On January, 1907, Justice Steele became chief justice by right of seniority, Justice Gabbert's term of office expiring. Justice Gabbert was continued as a member of the court by re-election, and Justice Charles F. Caswell was elected as the successor of Justice Gunter.

Justice Caswell died November 21, 1907, and Hon. Joseph C. Helm was appointed as justice in his place. On January 11, 1909, the terms of Justices Helm, Goddard, Maxwell and George W. Bailey expired, and they were succeeded by Justices Morton S. Bailey, William A. Hill, George W. Musser and S. Harrison White, who had been elected in the general election of the preceding November.

The cases from which quotations have been made are considered as exemplary or characteristic, and no attempt has been made to review in detail the great volume of work accomplished by Justice Steele during his term of service in the Supreme Court. The great majority of cases in which he delivered the opinion of the court or recorded his concurrence or dissent were matters of the review of legal procedure in the lower courts, and, outside of the evidence they give of his painstaking attention to the onerous and in many cases tedious duties laid upon him, they afford little of general interest. In many cases, however, matters of public interest were discussed, the rights of the people were maintained, and the authority of the court was employed in the interest of justice outside of the mere routine of revision and supervision of the lower courts.

In the case of Hartman vs. Bailey (36 Colo., page 146), the point at issue was the right of fishing in streams stocked at the public expense, as dissociated from the question of trespass, and in this case Justice Steele concurred in the dissenting opinion of Justice Bailey, which strongly upheld the privileges of the fishermen. The case of People vs. District Court (37 Colo., 464) was the one in which the Supreme Court refused to recognize a rival authority in the issuing of "high prerogative writs," and granted a writ of prohibition against such exercise of power by Judge Johnson of the District Court of Denver. Justice Steele's dissent in this case was made orally, and was notable for the fact that he stated that the majority opinion was not submitted to him, and to Justice Gunter, who concurred in the dissent, until the preceding Friday, so that they had had no time to prepare an extended dissent.

The case of C. S. & I. Ry. Co. vs. Nichols (41 Colo., page 272) involved, in effect, the reversal of a decision of one of the earliest Colorado cases, which had been widely condemned not only as unjust but as inhumane by legal authorities, but which had still remained as the Colorado authority, although it had been somewhat modified by a decision given just previous to Justice Steele's arrival in the court. The decision in this case has been commented upon as an instance of the manner in which Justice Steele was able to maintain a firm opinion and stand, while observing the highest measure of courtesy and consideration for those with whom he disagreed. Among a multitude of cases involving something more than mere matters of routine may be mentioned the following: Denver vs. Kennedy (33 Colo., 93); Pueblo Co. vs. Strait (36 Colo., 138); City La Junta vs. Heath (38 Colo., 372); Lehman vs. Pettingell (39 Colo., 258); People vs. Rice (40 Colo., 508); Saleen vs. People (41 Colo., 318); Colo. Springs vs. Colo. City (42 Colo., 75); M. & P. P. Ry. vs. Harris (45 Colo., 186), and Roberts vs. C. S. & I. Co. (45 Colo., 189). The Harris case was especially interesting because it involved a recognition of the value of growing trees upon the mountain side computed upon another basis than their salable worth as lumber.

It must not be supposed from anything that has been hitherto said or omitted, or from the emphasis given to Justice Steele's dissenting opinions, that he was an inharmonious member of the court. The reverse of that condition was true. Justice Steele was a diligent student and a hard worker. He assumed a full share of the work of the court and never shirked or slighted the duty that was laid upon him. Except where matters of principle were concerned in which his opinions were at variance with those of his colleagues, he was a delightful and harmonious co-worker. He was free from eccentricities. His dissents represented careful judgments upon important points, and they were never merely disputatious or punctilious. He had a high sense of the dignity of the court, and the respect which he maintained at all times in his own words and conduct he extended to his colleagues, giving them the fullest possible measure of credit for sincerity of motive and honesty of purpose. It was this attitude, together with the sweetness and gentleness of his nature, which gave the explanation of the extraordinary fact that amid all the storm of bitter controversies, which drove men to acts and accusations of stormiest passion, Justice Steele made no enemies. Without fear and without reproach, "with malice toward none; with charity toward all; with firmness in the right as God gave" him to see the right; he walked openly in the sight of men. His host of friends watched with ever-increasing admiration the achievements of his expanding career; his opponents gave an unstinted measure of respect and personal liking; and the people, whose cause he never failed to maintain in reasonableness and justice, accorded to him the fullest measure of confidence, affection and esteem.

CHAPTER XV

THE COURT OF LAST RESORT

ROBERT STEELE came to the office of district attorney by the popular will and not by his own seeking. Before his term as district attorney had expired, he was chosen by the commissioners to the position of county judge. This choice was subsequently ratified by the people in a general election, and before their commission had lapsed he was again called to a higher place, the highest in the judicial system of the state. The original term was for nine years, but the constitutional amendment adopted in 1904 extended this term for one year, or until January, 1911. Once again, before his term of office had expired, he was transferred, by a higher than earthly power, to whatever of activity and opportunity the future holds for that man whose mortal course seems guided and controlled by an eternal purpose and whose life is spent in harmony with an eternal law.

Had Robert Steele continued to walk the paths of an earthly career he would have been assuredly re-elected to the Supreme Court. The nomination had already been given to him by acclamation by his party, without any solicitation or effort on his part. The independent vote of the state, which had grown rapidly to be more and more the controlling factor in general elections, was very largely in his favor. Even those voters who would have preferred another candidate for partisan or other reasons had no enmity toward Judge Steele. His re-election was generally conceded.

On the night of September 21, 1910, after a busy day, at his home in Denver, he was stricken with an attack of an apoplectic nature, and three weeks later, October 12, death came to him, after an illness through which the city and the state watched and hoped for his recovery. Even in his last hours his thoughts were with the people, for it is told that in one of the few periods of consciousness, receiving a drink of water from an attendant, he expressed the wish that there might be more cooling fountains along the highways, for the benefit of all those who are thirsty.

Not in the fullness of years when mental and physical powers had declined, but in the prime of wisdom and strength the great change came to him, and an Infinite Wisdom knows where and why that intelligence and activity were transferred to another sphere. Yet the work that he did was well done, and though he fought, in the minority, a losing fight for the great cause he cherished, he went from the field victorious, and through his efforts largely his cause was once more triumphant and his fight was won. That cause was the cause of human rights and popular self-government, the cause for which Liberty's exiles crossed the seas, for which Washington fought, for which the immortal company of the fathers of the republic, Franklin and Adams and Jefferson and many more, offered their all upon their country's altar; the cause for which Liberty and Patriotism still keep open the rolls of glorious fame.

For the fundamental principle of American free government is this: that in the long run better average results can be obtained by the free rule of the majority than by any other system that ever has been or can be devised by the wit of man. Every departure from the American principle tends toward minority rule—autocracy, aristocracy, theocracy, or, basest of all, government by a political machine, or any one of the innumerable titles beneath which it is sought to disguise opposition, in theory or in practice, to that rule of the people, by the people and for the people, to which Lincoln and many heroic patriots of a later day have devoted their lives. Not that the majority of the people is always wise, or always right, or that the majority does not make mistakes; but that the people are, and in the nature of things must be, the source of sovereign power and the court of last resort by whom all things and all men are to be judged.

Robert Steele was one of those clear-sighted statesmen who have seen in the declaration that "all men are created free and equal," not the statement of a fact in biology or social science, but a fundamental principle of political philosophy, a living truth by which free government is established. He saw clearly the difference between that party organization which is maintained for the furtherance of political principles and governmental policies through the people's will, and that partisan machine which exists for the purpose of defeating and obstructing the will of the people and of controlling government against the public interest and for the benefit of ambitious or mercenary selfishness.

It has been said, and many times repeated:

> "Truth crushed to earth will rise again,
> The eternal years of God are hers;
> But Error, wounded, writhes with pain
> And dies among his worshippers,"——

but it would be hard to find at any other time or place an instance where victory came so soon after an apparently losing fight as in the case of Robert Steele. Even while the decisions from which he dissented were being written into the recorded law of the state, the people were gathering to the support of the standards he had raised. His clear, authoritative and unanswerable presentation of the primitive principles of American free government was the great rallying cry that brought the invincible hosts of democracy to his aid and swept to oblivion the structure that had been raised against his protest. Within two years from the time when his presence in the Supreme Court ceased, the rights he defended and the principles he maintained were re-established and confirmed, even though in some of these cases the majority decision yet stands as the highest judicial authority.

When Justice Gabbert declared in the Moyer case, in effect, that the writ of habeas corpus was a delusion and a fraud; that, though the chief of the military power might have no authority to suspend the writ, he had the power, incident to his authorization to suppress insurrection, to disregard the writ; and that the military power in the field is merely a manifestation of the supreme civil authority, thus satisfying the constitutional requirement of the subordination of the military to the civil power—is it any wonder that the people should feel the need of new defenses for their liberties, new instrumentalities by which their sovereign control of public power should be made effective?

When keen-witted corporation attorneys, fighting to maintain the hold upon government that had been gained by the interests they served, had won from the Supreme Court its approval of the high prerogative writs of the King's bench, which were the justly hated instruments of English tyranny, is it any wonder that the people themselves should have hurled back their answer in a declaration of their attributes of sovereignty, the High Prerogative Writs of the People: the Initiative, the Referendum and the Recall?

Justice Gunter, with his colleagues approving, except Justice Steele, punished Senator Patterson for constructive contempt of court, although Senator Patterson alleged, not in newspaper publication, but in open court and in written plea, the existence of a huge conspiracy, involving the legislature, the executive and the Supreme Court itself, to usurp and to control the powers of government for corporate advantage, and he offered thereof to make his proof. And the very judges whom he accused as instruments of that conspiracy refused his proffer of evidence and joined in inflicting a penalty for the constructive contempt of newspaper publication. Is it any wonder that the people of the state at the earliest possible opportunity wrote into constitutional law not merely the recall of judges, but the recall of judicial decisions as well?

Reference has already been made to the manner in which the judges who came from the people in the elections of 1908 and 1910 reversed the decision in the Johnson case and restored the principles that Justice Steele had laid down in the Sours case. That later decision, delivered by Justice M. S. Bailey, may be found reported in the case of The People *ex rel.* Attorney General vs. Cassiday *et al.* (50 Colo., page 503), and it is summarized in its essential points as follows:

1. The people of the state have plenary power to provide, by constitutional amendment, such methods of government for the state, or for any portion of the state, as may please them so long as there is no violation of the federal compact. To confer upon the people of a particular community authority to designate the agencies by which governmental duties therein shall be discharged is not obnoxious to any provision of the enabling act or of the federal constitution.

2. Where any provision of the constitution is framed in doubtful or uncertain language it is the province of the courts to construe it; but it is not within the province of the court to substitute other words for those used in the constitution, or place any forced construction thereon, or eliminate words found therein.

3. An amendment of the constitution is to be considered, treated and construed as if it had been written therein in the first instance.

4. Article 20 is, in all its provisions and for all purposes, a part of the constitution according to its clear import. Neither section 2 nor any other provision of that article has the effect, or assumes to set aside governmental duties and functions as to state and county affairs, within the territory named, and its whole effect is to provide that the people of the city and county of Denver shall, through their charter, designate the agencies which are to discharge those duties and functions which elsewhere in the state pertain to county officers, all of which functions and duties are preserved intact. This does not create a government unrepublican in form or involve any inhibition of the federal constitution, and was clearly one of the powers reserved to the people of the state upon entering into the federal compact. The doctrine of the majority opinion in The People *ex rel.* vs. Johnson (34 Colo., 143) rejected and that case overruled.

5. Since the adoption of this article and the formation of the municipal corporation of the city and county of Denver, there has never been within the limits thereof a county office or officer, as such, except as this proposition may have been affected by the decision of this court in Johnson's case.

Justice Bailey delivered the decision of the court *en banc*, Justices Campbell and Gabbert filing dissenting opinions and Justice Hill presenting a special concurring opinion, in which he said: "I am perfectly content to rest my ultimate conclusions upon the dissenting opinions by the late Chief Justice Steele and Mr. Justice Gunter in the former cases, and the majority opinion in this case."

The decision in the Tool case, from which Justice Steele dissented orally, because "it is unwarranted, without precedent and directly contrary to law," quickly passed into the domain of legal futilities. The Australian ballot law of 1889 was the first blow against machine politics, but it remained for the headless ballot law, adopted by the people in 1912, to destroy the main source of fraud and corruption in general elections. The direct primary law of 1911, sound in principle and wofully defective in detail, relaxed and almost released the control of party nominations by the machines, and went far toward making the party platform a declaration of genuine principles and sincere purposes of administration.

Out of the decision in the Sours case, as restored by the decision in the Cassiday case, has grown the structure of free self-government for cities, by which the cities themselves are delivered from corruption, misgovernment and usurpation, from Tammany and "Big Mitt," on one side, from franchise grabbers and boodlers, vote buyers and vote sellers, bribe givers and bribe takers, on the other; and by which the state has been saved from the contagion and the corruption of the machine politics of the cities.

Thus the great principles for which Justice Steele contended—the right of personal liberty, the right of free speech and a free press, the right of free elections unimpaired by the interferences of political machines, the right of the people to free self-government according to their own will, and to alter, amend and abolish their constitution in order to promote their welfare and happiness—were reaffirmed and re-established by the sovereign power of the people themselves.

It was in the Sours case that Justice Steele wrote into the decision what was not merely a statement of fundamental law, but was also his appeal to the court of last resort, to the will of the people; for he based his decision in that case upon the fundamental provision of the bill of rights: "That all political power is vested in and derived from the people; that all government, of right, originates from the people, is founded upon their will only and is instituted solely for the good of the whole; and that the people of the state have the sole and exclusive right of governing themselves, as a free, sovereign and independent state; and to alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness, provided such change be not repugnant to the constitution of the United States."

To Robert Steele those words were the embodiment of living truth, through which men should be free. They were not an empty form, a trick to deceive the multitude; they were the voice of the spirit of liberty, the vital essence of American freedom. By virtue of the new and extraordinary instruments of democracy, the basic principles of the Magna Charta, of the Declaration of Independence, of the constitutions of the state and the nation have been strengthened, delivered and restored. Old evils have been destroyed; imminent dangers have been avoided; flagrant abuses have been corrected; usurpers have been ousted; rights have been regained. With those weapons of democracy firmly in hand, the people's fight seems won, but the eternal warfare continues. Out of the depths of ignorance and depravity the forces of anarchy still rise for the destruction of law and order, for waste and for pillage. From selfishness, from ambition and from greed is ever renewed the impulse to debase the charter of the people's rights to a counterfeit and a sham, and under the guise of a free constitution to make of government something else than the rule of the people. The myriad hosts of those who desire, for whatever reason, honest or dishonest, some other government than the American government, of their generation there is no end; yet hope reigns supreme,

> "For Freedom's battle, oft begun,
> Bequeathed from bleeding sire to son,
> Though baffled oft, is ever won."

Whenever the skies are most serene, and the people most happy and secure, as well as in those darker moments when the storm clouds gather, as gather they must again, when the tempests of passion and of regeneration shake the foundations of our civic temples, the people of Colorado, and many beyond her borders, may gather inspiration, courage and faith unconquerable from the life, the labors and the triumph of Robert Wilbur Steele, Defender of Liberty.

CHAPTER XVI

IN THE MEASURE OF APPRECIATION

Robert Steele was not a man who loved to walk the upper trails of life unaccompanied. A genial companion, a true friend and lover of the people, the work of the Supreme Court involved one element that was alien to his nature and distasteful to his desires. He was extremely scrupulous in maintaining the dignity of his position, and he defended the strict honor of the impartial judge even at the sacrifice of some friendships that under other conditions would have been most delightful to him. He felt that he had no right to be a political partisan in anything that involved his official authority, and that he had no right to risk any personal partiality or favoritism in matters that might come before him for his decision. Giving full recognition to the importance of the place he occupied, he sometimes wished that he might be in a position where he would have a more intimate relation to the affairs of the common people, sharing their joys and sorrows, and helping them as he was used to do when he was judge of the County Court.

This feeling of isolation and of remoteness was intensified by the fact that for a number of years he found himself in opposition to his judicial associates and the object of disapproval from many of the most prominent men of his time and state. It is one thing to maintain firmly what conscience declares to be right; and it is a different thing to be wholly indifferent to the opinions of those by whom one is surrounded. Robert Steele was intensely conscientious, but he was never apathetic. The dignity of his position and the matters of constitutional law that occupied his daily attention separated him from close contact with the people, but he never lost his interest in them; and, what is more remarkable, they never lost their confidence in the people's judge, but rather increased their affection and esteem through the passing years.

Robert Steele's work speaks for itself, and the imperishable proof of his ability and his patriotism is found forever in those opinions which only need interpretation to the extent of reviewing the conditions of their times and of narrating their results. But it is always interesting to see what the people of his own time think of the man who is leading their thought and action, and how far he receives due credit for his work from those for whom, primarily, that work is performed. Robert Steele was singularly fortunate in this respect, and it is easy to gather from letters, from public statements and from newspapers of the time, the evidence of what people thought of him and of his work.

The political party from which he received his highest official honors, and to which he gave a full measure of loyalty and confidence, freely acknowledged his character and his standing among the people. The Democratic state convention of 1910 was held in September in the Denver auditorium, which Judge Steele had been largely instrumental in securing for the people of the city. After he was nominated unanimously, the cheers of the great multitude called him to the front of the stage to accept their proof of commendation. As he came forward a hush fell upon the vast assembly, which waited in almost breathless silence for what he might say. It was a moment of vindication and triumph. The political party which had placed him in that high position of trust and responsibility had set its seal of approval upon his course, and had ratified his actions that had been the subject of so much earnest discussion, bitter criticism and fierce controversy. It was the culminating moment of his public career, for already, though they knew it not, the end of his activity was drawing near and he stood before them as one upon whom the shadow of eternity had already fallen and whose mind was set upon higher than earthly things. In that supreme moment he found occasion only for the simple words: "I thank you; I thank you from the bottom of my heart."

In presenting the name of Robert W. Steele before the Democratic state convention for renomination, former Governor Alva Adams had said:

> "There is no need of verbal credentials. The written records of our courts are his vouchers. His life and official career are a part of Colorado's history. He is not an experiment, but a loyal servant, tried and true.
>
> "The name Robert W. Steele is to Colorado people more eloquent than any oration my tongue can weave. His decisions are a proud chapter in the annals of western jurisprudence.
>
> "For no act will his courage be more respected than when, in indignant rebuke of his court, he wrote upon a political decision the protest: 'I dissent from the judgment of the court because it is unwarranted, is without precedent and directly contrary to law.' This burst of judicial indignation blazes from a page of political infamy as a fixed star shines from midnight blackness. In the keeping of such fearless and just men Colorado may well trust her liberties.
>
> "Judge Steele is not devoid of political convictions, but upon the bench he is not partisan. He deals in law and justice and not partisanship. Before his tribunal all factions may stand with confidence. For political friends and political foes, for rich and poor, for corporations and their patrons he has but one reading of the law.
>
> "As a man and a citizen he is respected by all. From boyhood to middle life he has walked the ways of Colorado and no calumny has touched him. No stain has marred his escutcheon.
>
> "His integrity is as firm as yonder mountains, his character as white and pure as the snows that yesterday fell upon their high-lifted summits. As a neighbor and a friend he typifies Homer's modest hero, 'who lived in a house by the side of the road and was the friend of man.' A true son of Colorado, he will ever uphold the dignity and fair fame of the state. As a candidate he will appeal to the patriotism and highest ideals of our people."

On October 13, 1910, Governor John F. Shafroth issued an official proclamation, as follows:

"*Whereas,* the Hon. Robert W. Steele, chief justice of the Supreme Court of the state of Colorado, died on Wednesday evening, October 12, 1910; and,

"*Whereas,* Justice Steele had been a member of the Supreme Court for the period of ten years, and in that time has established the highest reputation for judicial ability, conscientious action and honorable conduct; and,

"*Whereas,* he was beloved by all the people of this commonwealth, whose people desire to show their appreciation of his high moral character by having an opportunity to view his remains; it is therefore

"*Ordered,* that, as a tribute to his high worth, the body of Justice Steele lie in state in the capitol building, in Denver, Colorado, between the hours of 2 o'clock and 6 o'clock p. m. on Friday, October 14, 1910, at which time the opportunity will be given to all friends and admirers who desire to pay this respect to his memory. It is further

"*Ordered,* that all the offices in the capitol building be closed between the said hours, and that the flag at the state house be carried at half-mast for four weeks.

"Given under my hand and the executive seal this 13th day of October, A. D. 1910. "JOHN F. SHAFROTH, Governor."

The following resolutions were presented to the house and senate by a special committee and were adopted by unanimous vote:

"*Resolved,* that the death of Chief Justice Robert W. Steele of the Supreme Court of the state of Colorado during the session of the Seventeenth general assembly has devolved upon its members the sad duty of giving form and expression to their feelings over an event which, in common with the citizens of the entire commonwealth, has overwhelmed them in a great affliction. For ten years he was a member of the highest court of the state; he there served the cause of justice without fear and without reproach. His strength of purpose, his courageous independence, his broad sympathies, his strong and thoughtful utterances commanded heed throughout the state and aided in maintaining the people's respect for the law. His public life was a potent force for personal and civic righteousness. But the influence of his public activity and achievement was no less forceful than the depth and richness of his private life, pure in mind, unaffected, gentle, honest and sincere, a beloved jurist, a friend of all men.

"*Resolved,* further, that in the midst of universal grief we are not unmindful of the greater affliction which the death of Justice Steele has visited upon his own family, the loving wife and other relatives; to them we tender our most heartfelt and abiding sympathy in this, the darkest hour of their existence.

"*Resolved,* further, that this resolution be spread upon the journals of the senate and the house of representatives, and that a duly engrossed copy, properly signed, be forwarded to the family of Justice Steele."

The following, Senate Joint Resolution No. 13, was adopted by the Eighteenth General Assembly in February, 1911:

"*Whereas,* the Honorable Robert W. Steele, chief justice of the Supreme Court of the state of Colorado, died on October 12, 1910; and,

"*Whereas,* Justice Steele had been a member of the Supreme Court of this state for the period of ten years, and for many years prior thereto had served the people of this state as judge in other courts thereof, and in that time had established the highest reputation for judicial ability, conscientious action and honorable conduct; and,

"*Whereas,* he was beloved by all the people of this commonwealth, and it is fitting and proper that a memorial should be placed to perpetuate his memory; now, therefore, be it

"*Resolved,* by the Senate of the Eighteenth general assembly of the state of Colorado, the House of Representatives concurring therein, that a memorial window of Justice Steele shall be erected and placed in the Supreme Court room at the state capitol, and that the governor and chief justice of the Supreme Court of the state of Colorado, together with the treasurer of the state of Colorado, are hereby appointed a commission to superintend and have charge of the placing of said memorial window.

"STEPHEN F. FITZGARRALD,
"President of the Senate.
"GEO. MCLACHLAN,
"Speaker of the House of Representatives.

"Approved February 9, 1911.
"JOHN F. SHAFROTH,
"Governor of Colorado."

In accordance with this resolution, a stained glass memorial window was placed in the Supreme Court room according to the design as shown opposite page 253 of this volume.

The Denver Bar Association adopted the following resolution:

"We join, with a grief peculiarly our own, in the state-wide mourning over the death of Robert Wilbur Steele. He was one of us. The late chief justice, whose untimely death has brought sorrow to all our people, grew up among us and with us; here his boyhood days were spent; here he made his preparations for the bar; here was the scene of his first professional and judicial labors; among the members of this association are still left some of his preceptors, a dwindling number of his predecessors, many of his contemporaries, and those younger men, now in the majority, who have observed his course and had the benefit of his example.

"This tribute of the Denver Bar Association is based on knowledge of the splendid personality we eulogize. As lawyers we cannot but know the worth of his sterling character, his unswerving integrity, his nobility of thought, his high sense of personal honor, and his faithful adherence to all his own high precepts in time of adversity and trial; it was these qualities which endeared him to us and secured the profound appreciation of the public at large.

"The wide sympathy of his nature, his innate love of justice, and his strong desire to fit the abstract principles of law to the rapidly developing theories of human rights, brought from our citizenship a quick, intelligent and appreciative response. His decisions while on the Supreme bench will ever remain a monument to his ability, patriotism and sense of right. His mind was of that fine texture which was quick to detect wrong; he despised meanness, dishonesty, chicanery, and the defilement which an intensely commercial age has brought into our business and political life. In him there was no spirit of compromise with evil.

"We believe his public career to have been of great service to the state he loved so well. He has left us a heritage which will be found of increasing value as the years pass on. We admired his character in private life, his conduct in official life, and we prize above all intellectual attributes the full, lovable and rounded proportions of his complete and finished manhood.

"The years of our friend seem unfinished, but their incompleteness is in numbers only. 'That life is long which answers life's great end.'

"Respectfully submitted,
"T. J. O'Donnell,
"G. C. Bartels,
"C. S. Thomas,
"James H. Brown,
"Ralph Talbot,
"H. M. Orahood,
"F. W. Sanborn,
"R. J. Pitkin,
"Committee."

Upon the occasion of the presentation of the memorial of the Denver Bar Association, Justice Campbell, between whom and Judge Steele a strong personal friendship existed for many years, responded for the Supreme Court, saying:

"The approval of the pure and upright is a laudable longing of every normal person. If to the late chief justice could be wafted the glowing eulogy of his bar and the eloquent addresses of distinguished lawyers, he would cherish the winged words of appreciation as balm to his weary soul. The subject of this memorial was no ordinary man; from early manhood, almost continuously to the end of an eventful life, he held public office in the judicial department of government—as clerk of the County Court, district attorney, county judge, and a judge on this bench. In these important offices, with which an appreciative people honored him, he brought that fidelity and personal integrity and devotion to duty which a sensitive conscience should always devote to public trusts. His was a forceful, positive, aggressive and dominating personality, and yet, harmoniously co-operating with these virile qualities, was almost a woman's tenderness, which softens the asperity of conduct these qualities alone engender. Impetuous and daring as he was, at times almost to rashness; firm and unyielding, nearly to obstinacy, when a matter of profound conviction was involved; nevertheless, he was cautious, given to exacting introspection, and, under sympathetic treatment, yielding, nearly to the point, but not beyond, of surrendering opinion in matters of less moment. * * * It was his administration on the probate side of the County Court that merits more than passing notice, and, from many conversations, I know it was in this branch of judicial labor, and at this juncture of his career, that he took the most unalloyed satisfaction, and of which he was most justly proud. With his rapidly growing county of old Arapahoe, the probate docket kept pace, and the probate business, combined with the civil causes there pending, was beyond the endurance of any one man. Unfortunately, the vitally important probate business at times had been neglected as a result of the importunities of living suitors who were parties to civil causes. The latter were present to press their own cases, while the decedent could not care for his own estate, and, out of the opportunity which was afforded by the inability of the court, for lack of time, to prevent, the faithless representative sometimes sacked the estate, or permitted others to plunder it. Judge Steele quickly put a stop to all these exploitations. No pressure of civil business, no artifice ever so cunningly devised, no subterfuge be it ever so adroit, was permitted to withdraw his careful oversight, or withhold his intelligent protection of the great and small estates which passed through his court. The rights of widows and orphans, of the insane and minors, of the unfortunates of every class, were safeguarded by his watchful eye, and all attempts to prey upon them that were brought to his attention were frustrated. Here was the public field in which Judge Steele especially shone, and here he set an example of public rectitude, courage and devotion worthy of imitation by his successors."

Many other organizations adopted resolutions expressing their high opinion of Judge Steele's character and their recognition of his work. Among these were the Denver Chamber of Commerce, the Christian Citizenship Union, many trades and labor organizations in Pueblo, Silverton and other cities of the state, and the bar associations of many counties.

On January 11, 1912, the Board of Education of the Denver school district named the new building, located on Marion street between Alameda and Dakota streets, the Robert W. Steele School. The first section of the building was completed ready for use at the beginning of the fall term in 1913. This memorial is shown in the illustration facing page 157.

The following extracts from letters, articles and personal statements will serve to show further how Judge Steele was regarded, as an official and as a man, by the men of his own time, who knew him best and who came into closest touch with the charm of his personality. Yet these are only illustrative, for his widest appreciation came from the great masses of the people, from the unlettered as well as the learned, from both rich and poor, and from all sorts and conditions of men who recognized integrity and justice and righteousness.

Rev. Allan A. Tanner, D.D.:

"Judge Steele was so far ahead of his day in his understanding of human need, and in his vision of that justice which includes inquiry into the purposes of the Creator, that there was no possibility of his being fully appreciated or even fully understood. If it had not been for his wonderful poise and balance he would have been altogether out of place in our yet acquired civilization. What a remarkable combination he was of compassion and of common sense, of sympathy for the poor and of fairness toward all! He was of the Lincoln type of statesmen, of the Christ type of Christians. There is no measuring of what Judge Steele suffered over the woes and wrongs of those around him, but upon such men progress must depend both in this world and in the world unseen. How idle it is to ask if such men are religious, for no man holds the ideals that Judge Steele held, no man faces opposition in the heroic way that Judge Steele did, unless he is a real student and follower of the ways and will of God."

Mrs. Nannie O. S. Dodge:

"Robert W. Steele was a member of the highest class in the Denver high school when I became a teacher in that school in 1875.

"The school was small and teachers and pupils were almost like one family. That was the day of beginnings, the time when precedents were established which have since become rules and traditions.

"Robert Steele was interested in the regular school work, but still more interested in helping to establish and organize for the future. The first literary society, the Lyceum, was begun largely through his efforts. The debates which gave practice in parliamentary usage were a delight to him. Always modest, he forgot himself completely when on his feet debating, delivering an oration or declamation, or when acting as chairman of any organization.

"After graduation school was not forgotten. Robert interested himself in founding the alumni association and became its first president. The Denver high school never had a more loyal friend and has reason to be proud of the whole career of this recognized leader of its first graduating class.

"During the years between the graduation of this boy and the passing of this chief justice of Colorado I saw my friend and former pupil often and watched his work with great interest. Many of the traits which he showed as a boy marked him as a man. He was a leader and organizer; was always conscientious, kind and just, modest and able, ever trying to assist those in trouble, always taking a firm stand for what he considered right, even when he must stand alone.

"These words fittingly describe the life of my true friend:

" 'He did justly; he loved mercy; he walked humbly with his God.' "

Mr. Frank S. Woodbury:

"From the ages of 14 to 51, Robert W. Steele and I were classmates, friends and confidants. First and foremost among his characteristics was his remarkable instantaneous perception of right and wrong. He instinctively separated the true from the false, without the slightest apparent effort. He had sincere sympathy and a helping hand for those who were down. He never considered the hope of reward for himself. His sense of justice which finally made him so distinguished sprang from this combination of the sense of right and wrong with human sympathy. No honors could exalt him above his old friends. To know him well was to love him."

Mr. William G. Evans:

One of Judge Steele's most intimate friends and associates was Mr. William G. Evans, whose father, Governor John Evans, had been a friend and hunting companion of Doctor Steele in the old days in Ohio. Though often at variance in matters of politics and public policy, there was never any weakening of their personal friendliness. "Robert Steele," said Mr. Evans recently, "was especially distinguished for his personal character, which was without a flaw. Clean and upright in all things, he made a splendid record as clerk of the Probate Court, as district attorney, as county judge and as judge of the Supreme Court. As county judge his work was especially commendable, and his supervision of the estates that came under his care as probate judge was of the highest type of public service. His business ability was demonstrated by his successful investments made by him early in life, and his conduct in the trying days of the panic, and in the disentanglement of financial complications for which he was only partially responsible, was highly creditable to him. In early life he was greatly interested in politics, and at one time he had a stronger personal following of friends and admirers than any other young man of the city or state. He was always kindly and helpful toward those that needed his help, and a true friend to his many friends. His energy also was remarkable, and he was always active in whatever cause engaged his interest. His purity and integrity of life, his kindliness of disposition and his nobility of purpose won the respect and the approval of all."

Mr. William Holt, Seattle, Wash.:

"The newspaper comments show how strong and nobly he stood before the people; and this was the result, not of ostentation, but of simple life, love and truth. I never read more heartfelt words of love and sympathy. He was liked not alone for his ability and comprehensive mind, but his big heart appealed to and touched everyone who knew him."

Mr. R. D. Thompson:

"He was a man of pure life. He was warm in his friendships and always loyal to his friends. I don't believe there was a spark of hypocrisy in this nature. I never heard anyone even intimate that he could be guilty of a dishonorable act. He had the faculty of making friends. In his friendships he always was sincere. Those who knew him loved him. His friendship was warm and cordial, something worth having."

Governor John F. Shafroth:

"I had the highest appreciation of the character of Justice Steele. He was one of the most able and conscientious men who ever served in the Supreme Court. Our loss is incalculable. There was a conscientiousness running through all his decisions that made him an object of love of the people of Colorado."

Mrs. Mary C. C. Bradford:

"The state of Colorado can boast of many illustrious citizens, but of none who have left a nobler record than that contained in the life of Robert W. Steele.

"As a student, a lawyer and sitting upon the bench, his vision was clear and true, his conscience responsive to the demand of the essentially great things that move men's souls to action.

"In his family life he realized all the ideals of those who regard the home as the holy of holies of a nation's life.

"A friend of the friendless, a dispenser of justice, a valiant leader in every cause that made for righteousness, Robert W. Steele expressed, in public and in private, the inspiration of the early days of the republic, yet greeted with welcome those social transformations that bid fair to make the twentieth century a glorious jewel in the rosary of the ages.

"Indomitable, patient, far-seeing, of unfaltering courage, Colorado's great chief justice was yet as single-minded as a child and tender and forgiving as a woman.

"All too cold and colorless are these words to fully interpret the beauty of the years wherein he spent, and was spent, for his beloved state. Yet, warmed with a grateful friendship, they are offered here as a tribute, however inadequate, to this uncorruptible son of a great state."

Mr. Thomas M. Patterson:

"I had known Robert W. Steele as man and boy for thirty-five years, but until he was elected justice of the Supreme Court my knowledge of him was only such as one has of another who is his townsman, but between whom and himself there was but little intimacy and no confidences.

"I knew he was the son of a pioneer physician and public-spirited citizen who was known and held in high regard by the people of the entire state.

"When county judge he developed into a jurist of sweet and lovable bearing, of large sympathies—one who never lost sight of the equities in the cases he was required to decide.

"His nomination and election to the high office of Supreme Court justice came as a surprise to him. He was not a candidate for the nomination in any sense. His party tendered it to him with a unanimity begotten of a knowledge of his splendid manly qualities and absolute faith in his capacity and integrity.

"It was after his election that I began to know him well. I recall a conversation with him, after he had donned the judicial robes, that showed in bright light his modesty—I might almost say his humility. 'My selection for the Supreme bench,' he said, 'dazed me. I wondered if it were possible that I would be elected, and then I wondered whether my friends wouldn't regard me as presumptuous for daring to sit with the other judges to speak the final word in the great cases that body was constantly called upon to decide. It was a long time before the thing seemed real. I feared I would wake up and find it all a dream.'

"But when he once assumed the duties of the high bench all hesitation vanished. He continued to be the same sweet, lovable man that had locked his friends of former days to his rise and fortunes. His low voice and dark brown eyes gave help and confidence to the young and untried lawyer; his receptive attitude and searching questions assured the well trained lawyer that he was addressing a keen analyst and capable critic. From the first case in which he sat till the hour he was stricken, the bar of the state realized that they had selected a brave, wise and fearless judge and that law and justice had acquired an exponent and defender that would advance them over all obstacles and maintain them at whatever cost.

"He became Supreme Court judge in a critical time for the state. It was in economic and social unrest. Labor troubles of vast proportions challenged the rich and powerful to disregard the fundamentals of free government and to seat wealth in the places framed for law and human rights. Some judges yielded to the passions of those troublesome times, but Judge Steele, never. In a series of cases that the troubles evoked strange law was announced from the bench, but Judge Steele's dissenting opinions ever marked the line at which law and justice strayed from their orbits and to which in the calmer hours public opinion forced them to return to resume their orderly course.

"The night before Judge Steele was stricken I walked with him to our homes, which were in the same neighborhood. It was quite near the midnight hour and the skies were placid and serene. He indulged in retrospect which included father, mother, wife and children and his own fortunes, past and future. I have since wondered whether the spell of the illumined, yet unknown, after-life did not lead him into the rhapsodies and confidences of that last meeting.

"The next day the blow fell. His great mind was clouded; his great heart's throbs were numbered. He passed away, his memory enshrined with the affections and admiration of every class—of the rich and the poor, of the millionaire and workingman. They all felt that a sheet-anchor of the nation's honor and safety had dragged and with his death had broken."

Mr. Horace N. Hawkins:

"The judicial record of Robert W. Steele is open to all who will read the Colorado Supreme Court reports. Embalmed forever in those volumes are the great opinions delivered by him in support of the liberty and freedom of our people—opinions which, as long as our republic shall last, will be precedents against oppression and injustice. But to those who enjoyed an intimate acquaintance with Judge Steele, no reference to any written reports is necessary to keep alive his memory. In the hearts of his friends he is not dead, but will continue to live as long as those hearts shall beat. I never knew another who bound so closely to him in love and loyalty so many friends. That he had a legion of loyal and devoted friends is shown by the fact that, although he was modest as to his own ability, even to the point of diffidence, almost bashfulness, yet he advanced step by step until he stood upon the highest round of the judicial ladder in our state.

"The high honors with which he was crowned were due to no scrambling or pushing or place seeking upon his part, but to the friends who demanded of him that he accept the honors of which they knew him so worthy. Had he lived, he undoubtedly would eventually have graced the highest judicial tribunal of the nation.

"Perhaps above all else that attracted to him so many friends was what was commonly spoken of as his strong sense of 'fair play.' Whether he was district attorney, county judge, chief justice of the Supreme Court, or simply a private citizen, his eyes flashed and his jaw became set when he saw any unfair advantage attempted to be taken. Instinctively he went to the rescue of the 'under dog.' Scorning technicalities and sophistry, he perceived at a glance the very right of a controversy and hesitated not to array himself with those unjustly treated. Many times during his career I marveled that one who had himself never filled a lowly position in life could so thoroughly sympathize with the very poorest of our citizens. Truly, he loved his fellow man, and just as true was it that those who knew him well deeply and devotedly loved him.

"I repeat that in the hearts of his friends Robert W. Steele is not dead, but will continue to live as long as those hearts shall beat."

Mr. Guy Leroy Stevick:

"The strongest individual influence which I have ever met outside of my immediate family was Judge Robert W. Steele. Whether it was pleasure or business, no matter what the time, the place or occasion, he was always kind-hearted, clear-visioned of what was right or wrong, and strong in his advocacy of what he believed to be right, irrespective of its effect upon his personal or political fortunes. When the state seemed to be up in arms over irreconcilable differences between labor and capital, the one man who was always accessible, and to whom both sides could go with the knowledge that their views would be appreciated, and that, however great the difficulties, ill-will would have no part in the discussion and good humor would prevail, was Judge Steele.

"One of the most beautiful relations imaginable was that between Judge Steele and his son. From the time Robert, Jr., was old enough to go along on vacation outings, he accompanied his father, and when they were together there was complete harmony between them. This was due as much to the reverence and love of the son as to the kindly comradeship of the father. No subject of conversation was thought of and no kind of amusement proposed in which the boy could not take a part with the rest of us."

Miss Mary F. Lathrop:

"Ever since I was admitted to the bar I have known Justice Steele. He went out of his way to be kind to me, as he did to other embryo lawyers when he was in the County Court. His genial side was always in evidence."

Dr. S. B. McCormick, chancellor of the University of Pittsburgh:

"* * * More than twenty-seven years ago—about August 12, 1883—I first met Judge Steele. I had reached Denver the day before to take charge of R. D. Thompson's office. He was starting to Europe and he asked me to take his place on the county committee. R. W. Steele (he was Bob Steele then, and he has all these twenty-seven years been Bob Steele to me) was chairman of the committee. The qualities in him which bound me to him in five minutes and which have held me close all the years since are the qualities which bound and held the whole state of Colorado to him all these same years, and which made him the beloved chief justice of the commonwealth."

Judge Ben B. Lindsey:

"It is hard to get a Supreme judge in these days of universal suspicion of all men whom everyone can trust and love and respect. Everybody could trust and love Judge Steele, and all did so. * * * Judge Steele had the keenest sense of justice I have ever encountered. He was a sociological and economic student, and he looked always for the social justice of a thing. * * * On questions of social right he rose triumphant and rendered decisions which have become classic. It was because he possessed that sense of justice to such a remarkable extent. The story is told of the great Chief Justice John Marshall, of the Supreme Court of the United States, that he was once asked how he rendered his decisions. 'I do what seems right to me, and let Brother Story find the authorities.' Story was the great lawyer of the court of that time.

"Judge Steele put me on the County bench. I entered the law offices of Thompson, Steele & Malone as an office boy, and I scrubbed floors to get along. And the man who was always kind to me and who had always an encouraging word and a pat on the back was Judge Steele. When he was elevated to the Supreme bench he recommended my appointment as his successor. I was appointed and his advice and help to me were invaluable.

"I remember that, after he had been on the Supreme bench a while, Judge Steele said to me one day: 'Ben, I would rather be County judge than a Supreme justice. Down where you are you get an opportunity to help people who are in trouble. You can talk to them personally and give them advice, and that is what I like.'

"I believe that Judge Steele had more friends than any other man in the state. He had strong opinions, but he made friends because he advocated his opinions without bitterness."

Mr. Louis F. Post, Washington:

"In his period of activity, when so many officials—legislative, administrative and judicial—had withered under the influence of plutocracy, Judge Steele seemed like a shadow of a great rock in a weary land. Though I never knew him personally, it was my fortune to be an editorial observer of men and events while he sat upon the Colorado bench, and in this connection his high service came to my attention. He was so devoted to the wholesome ideals of democratic government, so firmly grounded in the great democratic principles of the law, so loyal to the one and so clear in expounding and courageous in applying the other, that his personality stood out in splendid relief against the dark background of his day."

Mr. Isaac N. Stevens:

"On my arrival here more than a quarter of a century ago as a young man I met Justice Steele, also a young man, and a friendship was then formed which grew closer as the years passed.

"I soon learned to appreciate Mr. Steele's integrity of thought and purpose and to admire his ability.

"From young manhood to the ripened years of middle life he constantly grew and expanded in intellect, in soulfulness and in human sympathy.

"I never knew a more tender, a more courageous or a more just man."

Hon. Louis W. Cunningham:

"I can recall the name of no public man who passed through trying ordeals such as characterized the career of the late chief justice with such fearless composure, and without the sacrifice of self-respect or public confidence. At times of great crises he differed radically with the majority of the Supreme Court as then organized. His dissenting opinions, ringing out boldly and clearly, gave hope to those who were battling for order within the law and calmed a disturbed commonwealth."

Father William O'Ryan:

"I knew Judge Steele very well. We never met for twenty and more years without a pleasant stop and chat. His father and I were quite intimate in olden times.

"It is unnecessary to say that I had a great admiration for Judge Steele."

Mr. Frank G. Nagel, Pacific Grove, Cal.:

"Life and its meaning is very much of an enigma to most of us who have failed to accomplish what seems to have been easily possible to us, but the Boy Orator laid a good foundation and built upon it a reputation for uprightness and good-will which is appreciated throughout the limits of his state."

The Robert Steele Cabin at Ward's Ranch, White River Valley

Mr. T. J. O'Donnell:

"Judge Steele, as became his ancestry, was intensely American in the best and truest sense of the word. To him the principles of the Declaration of Independence, the guaranties of liberty embodied in our constitution, the theories of human rights fructified into the American states and nation, were living, vital things, and every blow struck against them found him full armed and armored for their defense. His mind was too keen and alert not to discern the least insidious attempt to undermine the foundations, and those open assaults which he so sternly resisted found him fully accoutered for the battle, in which, though beaten, he was never conquered.

"Robert W. Steele was gifted with a mind which thought right. Instinctively he knew wrong, no matter how disguised or how fine the shadings; instinctively he despised meanness, dishonesty, chicane and all the defilement which an intensely commercial age has brought into our business and political life."

President James H. Baker of the Colorado State University:

"I was well acquainted with his father and as well acquainted with the young man as a principal becomes acquainted with his pupils. I took great interest in him as a boy. He possessed a lovable personality and rich nature. He gave promise of great possibilities and I took great pride in his development and advancement. His death is a matter of great sorrow to me, as it is to all the people of Colorado."

Mr. Thomas P. Fenlon, Kansas City, Mo.:

"To the state of Colorado, to which he was such a conspicuous honor, I offer my sincere condolence in the loss of its chief justice, who brought and gave to its highest court such high character and learning as a jurist, such a pleasing personality, such refined and dignified honesty of purpose and mind, that it has taken its place among the great courts of the land, and has been left a heritage by its chief justice which will make it ever a court to be aspired to by those only who are endued with the lofty and clean ideals of judicial integrity held by Judge Steele.

"It has been my great pleasure and privilege to have spent part of two summer vacations with Judge Steele, and that splendid son of his, whom he loved so well, in fishing on the White River; the memory of my associations and discussions with him will grow sweeter as the years pass on. How he loved it there! And I flatter myself and am pleased with the thought now that I contributed a little to his enjoyment last summer in some twice told tales of my fishing efforts in a vain ambition and attempt to equal his actual performances in pursuit of the speckled beauties.

"I had even begun to look forward at this early date, in accordance with his express wishes, to a renewal next summer of our pleasing incursions to the White River. It would hardly seem natural to go there now; the echoes from those beautiful and eternal mountains and the restless and unceasing song of that mountain stream would remain, but the real spirit and inspiration would be only a memory; it has passed to the farther shore, and he has felt already 'the breath of the eternal morning.'"

THE TRIUMPH OF MORAL ENERGY

By George L. Knapp:

"To me, the life of Judge Steele is a proof of what can be done by sober, consistent moral energy. I do not mean the so-called moral energy which exhausts itself in pronouncing panegyrics on its own purity, nor the closely allied kind which has a club out for every sin and a hand out for the campaign contribution of every sinner. I mean the steadfast enthusiasm for justice, for fair play, for personal liberty, for honesty of intellect as well as of purse. Judge Steele had this enthusiasm to a degree never rivaled in my experience of men; and it was this enthusiasm, this moral energy, that made him the man loved and trusted by the state beyond any other citizen. When Judge Steele saw justice in peril, he simply could not help fighting for it; and the greater the odds, the hotter the battle. He started out in life with a good brain, yet no better than that of thousands of men whose tombstone alone will keep their memory beyond the year of their death. But Steele's brain was free from all bother of self-interest, was consecrated to public service with a singleness of purpose for which there are few parallels; and a brain put to that use in that fashion is bound to grow and increase.

"The full measure of Judge Steele's service to the state has not yet been taken; perhaps cannot be taken till the generation which saw his work shall have passed away. His dissenting opinions are all that saved the state from utter judicial disgrace; but personally I believe his presence on the bench prevented the worst of the conspiracies of that day from ever coming to light. Bad as were the decisions passed over his protest, I have little doubt they would have been followed by worse ones, but for the persistent battle of Judge Steele. You may vote a man down when you know that he is right and you are wrong. But when the man comes grimly back to try it over as fast as occasion offers, making it entirely clear the while just what he thinks of you and your behavior, there comes a time when you will go out of your way rather than try the voting down game again.

"No man was more devoted to the interests of the people than Judge Steele. No man was less of a demagogue. He filed his dissenting opinions and he made them as sharp as words could make them. The other day, when he was nominated by acclamation by a convention which would not really agree on anything else under the sun, the usual call was made for a speech. Judge Steele came out on the platform, looked out over the sea of faces—the faces of his supporters—and, waving his hand for silence, said merely: 'I thank you!' He never hesitated to declare his position. He was never afraid to go on record. And he never played to the galleries, nor allowed himself to become a worshipper at the shrine of his own achievements.

"I am sorry, indeed, that we cannot make our own the words of the English king about Earl Percy, and say that we have within the land five hundred as good as he. But the mournful fact is that we have them not. Steele was our Douglas; not to be replaced. The state does not lack for men of intellect and conscience; but it has none who can wield the power for good which the years and his own character and the love of the people had put into the hands of Judge Steele."

HIS SPIRIT STILL RULES

By Boyd F. Gurley:

" 'I am perfectly content to base my ultimate judgment on the opinion of the great late Chief Justice Steele.'

"So wrote Justice Hill in participating in the decision which changed the protest of Judge Steele into the fundamental law of the state.

"It is well that this statement finds a place in the records of the court over which Judge Steele presided when called from earth.

"For these words, reflecting as they do the reverence which the great mass of citizens held for the judge who saw only Justice, and who believed in Men, give evidence of the fact that in death, even more than in life, Judge Steele will still rule the highest court of the state.

"Though his seat upon that tribunal is filled with another; though his kindly eyes do not look into the hearts of men, seeking that Substantial Justice be done, his spirit hovers over its sittings. Consciously or unconsciously, the judges upon that bench will compare their own judgments with what they believe he might have done.

"Almost involuntarily, the judges who are now in power, and who will follow, will seek for that vision of right; that belief in the goodness of mankind and the ability of men to rule themselves, which characterized his every judgment.

"They will seek that democracy of soul which believes that men are brothers and that courts are constituted to do exact justice between all.

"The decision which consolidates the city and county governments is no vindication for Judge Steele. He needed none. The people always believed that his dissent from the order of the majority of the court was Law, and, though they were powerless to obtain the benefits of his protest, looked upon his opinion as the just one.

"So it must be a matter of satisfaction that, in the official confirmation of his original judgment, the tribute of Judge Hill finds a place.

"Those who are fighting the cause of human brotherhood have missed the presence of Judge Steele these past months. They have felt the need of his encouragement, of his kindly wisdom that smiled in the darkest hours and kept Hope alive; of his prophetic philosophy, grounded in a catholicism of love for humanity that taught always, 'It will all be right in the end.'

"These may know that he has not gone, nor will he ever go, from the influences which build for better manhood and more freedom in this state. His example, his wisdom, his love are still here, to guide, to inspire and to encourage.

"From behind that curtain which separates the Present from the Eternal, his voice has whispered the same message of faith in humanity and in the power of the people to rule themselves which he spoke in so firm a voice but a few months ago.

"The people owe something to Judge Hill. He has reminded us that there are men who are so akin to Truth that they share its eternity of influence."

THE PEOPLE'S JUDGE AND HERO

By George Creel:

"Under this one man's protection, a people went forward to goals that had hitherto lured as will-o'-the-wisps. As Moses struck the rock, so did this great judge strike the law that justice might gush forth into a life-giving stream. He was at once inspiration and achievement, promise and fulfillment.

"The gentleness of him, his sweetness, simplicity and utter lack of ostentation—the quiet fashion in which he worked tremendous things—all contributed to a certain minimization of him during his life. The Rockies never loom large to one with his face against the foothills; but, pushed far away by the cold, imperious hand of death, we are given perspective. Judge Steele was of heroic stature, and cast in the mighty mold that gave Alfreds and Charlemagnes and Lincolns to the world.

"Is this too much to say? Not when one studies his record, reviews his career, and senses his achievements and the odds against which they were won. He went upon the Supreme bench at a time when Colorado lay prostrate under the bloody heel of anarchy—not the anarchy screamingly feared by a 'kept' press, but the Anarchy of Special Privilege, the Reign of Terror instituted by predatory millionaires in lawless control of the law. And this law was being torn into strips, and these strips were used to tie a people hand and foot that they might be pillaged and oppressed without disturbance or resistance.

"On the Supreme bench he was a minority of one! Had he been merely honest, only that kind of judge who contents himself with keeping his own robe clean, he would have brought no relief, worked no change. But he was a man in whom justice was as much an instinct as self-preservation itself. He had that rare passion for freedom and liberty and equality that God puts in certain souls lest the altar fires of hope and high resolve die out in a land. And in this simple, gentle, kindly man there was as great a courage as ever blazed forth on battle field, or snatched victory from impending disaster.

"He *fought.* No concealing shadows for him, no content with consciousness of personal integrity! Against the whole insolent, vicious, triumphant System he threw himself, and for years there waged a silent, deadly hand-to-hand battle that meant as much to Colorado as did Bunker Hill to the colonists. And he triumphed! From a minority of one, he became a majority of one. His dissenting opinions—so long the passionate revolts of an individual—became the *law.* He ceased to write upon plain paper in the loneliness of his chamber, and burned his decisions upon the statute books of the state.

"One by one he struck off the bonds that bound a people. And, as he worked, the slime fell away from the law, and it shone forth on all the golden glory that was intended. Instead of hatreds and revolts against the law, there came appreciation and understanding. And Colorado arose, stood erect, put aside all harassing and hampering rages and resentments, and went forward in courage and hope and confidence."

CHAPTER XVII

THE MAN WHOM THE PEOPLE LOVED

"I have always thought that the supreme test of a man's usefulness is furnished by the extent to which he possesses the love and confidence of the average man. If that is universal he has not lived in vain. Measured by that test, Robert W. Steele's fame was richly earned, and it is secure. Deep down in the hearts of all classes and conditions of men his image is impressed, his memory green. * * * And what a heritage to us all is his memory, the record of his deeds, his worth as a man, his greatness as a lawyer, his dignity as a magistrate! * * * What he did has been bequeathed to us as an example to encourage and to inspire. He was in life and death an example of the sublime truth that there is no wealth or honor like that which comes to a man who, in all his undertakings, has kept his faith unbroken."—Charles S. Thomas.

THREE elements go toward the making of manhood: heredity, environment and personality. Out of the eternal shadow comes the spirit that is materialized in the form shaped by physical inheritance, and through the pathways of life persons and events play their complicated parts in the formation of character and the development of physical and mental powers by concurrence with or resistance to outside influences. Yet among the three, heredity, environment and personality, the spirit forever remains supreme.

From his ancestors of the Ohio Valley Robert Steele drew his patriotism, his aptitude for culture and learning, and his strong inclination toward those traits of mind and body that are most aptly summarized in the expression, "an American gentleman." Those hereditary dispositions were fixed and strengthened by the associations of his youthful years. His education and his environment in early Denver confirmed his democracy of thought and feeling toward everyone that shared his highly prized right of American citizenship. His work as district attorney inculcated respect for law and order and gave him a practical experience in dealing with the demoralizing and disintegrating forces of modern society. In the County Court he profited by the study of human nature, and learned to judge motive and impulse as well as the legal issues that were presented to him. In the activities and associations of politics he encountered the complicated problems of matching great principles of human rights and liberties to the trivial, selfish and often sordid conditions of local government. In the Supreme Court his mental powers, stimulated by responsibility, rose and expanded to the measure of their opportunity, and proved equal to the demands that were made upon them.

But the man whom the people loved was neither the manifestation of heredity nor the product of circumstances. No purely materialistic theory can account for the way in which Robert Steele, from the days of his childhood, won the liking and the friendship of those with whom he came in contact. That was the demonstration of a spiritual power, the expression of a personality not limited by the physical laws of the world, but drawn from the reservoirs of eternity.

Much has been said, and it ought to have been said, of that clear and intuitive sense of right and wrong which was responsible for the strong and inerrant decisions upon the cases, however obscured, that were presented to him. But that sense of truth was something more than the standard rule by which he tested the men and the issues before him. It is not even sufficient to say that he measured his own acts by the same standard he applied to others. Robert Steele was not the servant of truth, but he was truth, for his spirit was the spirit of truth.

A great poet has written,

"Once to every man and nation comes the moment to decide,
In the strife of Truth with Falsehood, for the good or evil side."

Had Robert Steele made such a choice, had he deliberately and definitely, at a particular time in his career, spurned concrete offers of wealth and ambition and, consecrating himself to the cause of liberty and humanity, devoted his life to a party or a creed, he would have deserved commendation.

> "Then to side with Truth is noble when we share her wretched crust
> Ere her cause bring fame and profit, and 'tis prosperous to be just;
> Then it is the brave man chooses, while the coward stands aside
> Doubting in his abject spirit, till his Lord is crucified,
> And the multitude make virtue of the faith they had denied."

There is no record in the life of Robert Steele, or in the knowledge of those who knew him best, that at any time he ever gave consideration to a choice of something beneath the level of his intelligence and his conscience. Doubtless, opportunities of evil and of debasement came to him, as such opportunities come to all men. Doubtless, he saw glittering mirages of fame and honor and dazzling allurements of that wealth so plentifully bestowed in a prodigal age. Doubtless, the offer was made to him, and doubtless he realized that the offer was made, of "all the kingdoms of the earth and the glory of them" for no greater price than abasement before the Devil of greed and selfishness.

But Robert Steele was the Robert Steele whom the people loved because the proposition to sell his birthright for a mess of pottage did not appeal to him. The unfolding of his personality through the years was something more than the shaping of a material being through the incidence of events. It was, rather, the progressive triumph of a Master Spirit, embodied in earthly form, rising ever to the level of higher opportunities and using every experience gained and power won as instruments for the achievement of better things. The people of the state, who trusted him, were not disquieted by the fear that he might prove unworthy, because they felt that his integrity was not an acquired habit, nor a matter of preference, but it was something that was an inseparable part of himself.

That Robert Steele guarded the sacred fire of his innermost altar through all the years is a matter of general knowledge. Other men, perhaps with an equal endowment of original virtue, have lost their souls through one or more of the various forms through which the forces of evil and of decadence manifest themselves, but he always recognized conscience as the supreme authority of his life; he set Duty as the guide and duty performed as the end and aim of his career. In paraphrase of a familiar quotation, he was true to himself, and it followed, as the night the day, he could not then be false to any man.

From the central fire of his personal integrity the genial light and warmth of honesty, kindliness, unselfishness, gentle humor, patience, meekness, temperance, humility, and faith in the eternal righteousness of God and Man irradiated his pathway for his own blessing and for the benefit of all with whom he had to do. There was something hypnotic in the effect he had upon those who knew him even slightly, and the same quality was manifested in his gift of oratory, which had an effect disproportionate to the sum of subject-matter and skill of delivery, with full allowance made for excellence of both.

The broadness of his mental vision and the range of his active interest were befitting to a judge who was called upon to deal with the widest variety of personal and property rights and possessions. He loved the free air of God's great Outdoors. Mention has been made in an earlier chapter of his vacation visits to a ranch in the San Luis Valley and the benefits he gained therefrom. In after years he made many camping and wagon trips into the mountain wilderness of various parts of the state. In the valley of the White River, in northwestern Colorado, he maintained for many years a summer retreat from the cares and the toil of his laborious office. There, where the great mountains rise in primitive form and loveliness as they came from the hands of the Creator, where unscarred forests excite the reverence due in "God's first temples," where foaming torrents pause in sunny pools before they plunge through thousand-mile cañons to a distant western sea, he tuned his spirit to the harmony of simplicity and vastness in the primeval wilderness and in sincere humility recognized the spirit of that harmony as his own.

He loved the trees and the beautiful flowers that cover the ungardened meadows of those remote highlands; he loved the birds that course through the untainted air and build their nests where none may see or make afraid; he loved the wild, shy beasts that live on the wide upper pastures, that shelter themselves in the groves of aspen and spruce, or that lurk in the willow thickets along the mountain streams. He did not care for hunting, but he liked to fish and to smoke, soothing the demons of restlessness with subconscious activities, and devoting his major powers to an infinitely more important task, forever excluded from the experiences of those that seek mental refreshment only in convention crowds of great cities or upon the summer piazzas of resort hotels.

> "If the chosen soul could never be alone
> In deep mid-silence, open-doored to God,
> No greatness ever had been dreamed or done;
> Among dull hearts a prophet never grew;
> The nurse of full-grown souls is Solitude."

From the "little brothers" of the wilderness Robert Steele transferred his kindly thought and care to the animals of the cities. His part in the anti-docking laws has been mentioned. Denver's traffic squad was inaugurated when Justice Steele, looking out of the window of the Supreme Court room in the capitol building, saw the horses slipping and straining on the icy pavement of Colfax avenue and requisitioned the services of a policeman to direct them to a safer and an easier ascent. Two badges Justice Steele wore, and only two. One was that of the Loyal Legion which indicated the honorable service of his father as an officer of the cause of freedom and union in the Civil War, and his own willingness for patriotic service in the measure of duty in peace or in war. The other was that which commissioned him as a humane officer to intervene in the name of the state for the protection of animals abused or neglected.

But with all his interest in the world of Nature, Robert Steele's chief concern was with the world of man. He loved the wilderness, but he devoted his life to making the world a better place to live in and to helping those that needed his help. His was not the hermit's spirit, seeking the salvation of a miserly soul by withdrawal from the scene of early troubles and temptations, but he shared as best he might the burdens of the common people in the common ways of life, and gave himself freely to service in the place and the manner in which he could do the most good.

He loved the children. He liked to play with the little ones of his own household, to help them with their studies, to share their confidences, to form their ideals, to comfort them in their troubles and to help them in their difficulties. His "juvenile field day" in the County Court showed how his fatherly interest was extended to the fatherless.

The Steele Hospital, named in honor of his father, directed his attention particularly toward that branch of public beneficence; and from time to time he gave substantial proof of his interest in that work.

He was much interested in educational matters and recognized fully their importance in the scheme of civic duty and opportunity, though the labors of a diverse career gave him but little opportunity for activity in educational lines. His eminence in legal learning brought to him the well-deserved recognition of a master's degree from Center College, alma mater of Doctor Steele, and Denver University later added a doctor's degree in laws. As a member of the University Club he found in its circle his favorite means of social enjoyment and relaxation.

He was no respecter of persons along the lines of wealth and station, and this was true of his personal regard as well as of his official attitude and action. He was quick to recognize worth and nobility, of character and of intellect, and this recognition was as promptly and as cordially given in the log cabins of White River or to the man on the sidewalk, as to his associates of the club parlor or of his chamber at the capitol. Men invariably accorded to him the respect he merited, but he never claimed their tribute to his moral or mental worth. Probably he never thought of any such thing.

He had a very high regard for the authority he exercised, and a very sincere humility for himself. He very scrupulously avoided any action or appearance that was beneath the dignity of a justice of the Supreme Court. He refused absolutely to be drawn into any scheme to make his place or his dignity an appanage of interest or ambition. He never advertised himself; he refused to advertise others. He shunned publicity as earnestly as many seek after it, and, though he had exceptional ability as a speaker, he seldom used that gift in later years lest his appearance might be misconstrued. He would not seek his renomination. He declined to take part in the campaign by which he was elected to the Supreme Court. He excused himself from marrying those persons who sought display through his services because he was a justice of the Supreme Court, but he accorded that distinction to a servant of his own household who had earned his respect by years of faithful service.

He was scrupulously honest and honorable in small matters as well as large, not according to the easy letters of the law and of social custom, but according to the faultless guiding of an inner sense. He was temperate, walking always in the light of that reason that despises intemperance in thought, in word and in action as a folly even worse than a crime. He was pure in thought, in word and in deed. He was brave under circumstances that would have tried the courage of any man. He was calm when passionate anger would appear to be inevitable. He was kind and considerate even toward those to whom it was his duty to measure punishment, and also toward those whom in the line of his duty he strenuously combatted and steadfastly opposed.

Such are the words and phrases, not of empty eulogy or lavish encomium, but of the sober judgment of the men of his own day and of his personal acquaintance, the painstaking portraiture for the benefit of the men of other times and of other states of one of whom it may be said in sober truth and exactitude:

> "None knew him but to love him,
> None named him but to praise."

To the young men of Colorado, and especially to the young lawyers of the Denver bar, Judge Steele was a model, an example, an inspiration, a friend and helper. He had a high sense of the ethics and the responsibilities of the legal profession, and scrupulously upheld its honor both as an attorney and a judge. But he also had a most kindly interest in and regard for the young men around him and he always did whatever he could to help them along the path he had pursued. The beautifully illuminated seal upon the certificate issued upon admission to the bar is a mark of his consideration, for he arranged its colors with his own hand, thinking that "the young men ought to have something better than a plain seal in black and white."

His interest in them they returned with something warmer and more personal than the respect due to an older and wiser man, with something more affectionate than the honor paid to the judge who was eminently successful in the profession they had chosen for their own. They loved him because he appealed to the best that was in them, as men and as Americans. He had faith in them, as he had faith in the nation to which he gave the unstinted measure of his service and devotion.

Patriotism and love of humanity were the guiding stars of his career—not rival and inconsistent objects of his regard, but harmonious parts of a resolute purpose. To those high ideals his life was consecrated, not in the formalism of a conscious statement, but rather in the expression of a lifetime of loyalty and truth. As in the County Court he had guarded the interests of the widows and the orphans, so in the higher tribunal he defended the inheritance of liberty. The citizens of the republic were his wards; the usurpers of the people's rights were his adversaries; freedom was a sacred trust committed to his keeping; and he recognized no other treason so vile as that of the public official, in legislative, executive or judicial position, who would use the power entrusted to him for the people's welfare to betray their trust.

He held ever a supreme faith in the American republic; a glory in its historic achievements; a pride in its wealth, its resources, its strength, its prosperity, and in all the magnificent accomplishments of its civilization. He felt a steadfast confidence in its future, believing that through all its difficulties and dangers things would come out right in the end, because he believed in the people, in their patriotism and in their love of truth and justice.

Through the distractions and the temptations of an age when the conditions in state and nation seemed to appeal as never before to the selfishness, to the avarice and to the ambition of men's natures, Robert Steele kept faith with the people and with himself. He did his full part to hand on to Americans of the future the full measure of the inheritance of freedom with which he had been endowed; and he never doubted that there would always be men of his own mold, who would carry forward his work as he had sustained the work of others, and that, amid the struggle for wealth and the strife of selfish ambition, there would always be those who would resolutely pursue the Higher Way, and who, guided by Reason and enlightened by Truth, would strive, fearlessly and unfailingly, according to the full measure of their powers and opportunities, for Liberty and Justice and Humanity.

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